

2. What changes did the agencies make from the proposed rule based on public comments?

In the proposal, the agencies sought comment on a number of ways to address and clarify jurisdiction over “adjacent waters,” including establishing a floodplain interval and providing clarity on reasonable proximity as an important aspect of adjacency. In light of the comments, the science, the agencies’ experience, and the Supreme Court’s consistent recognition of the agencies’ discretion to interpret the bounds of CWA jurisdiction, the agencies have made some revisions in the final rule designed to more clearly establish boundaries on the scope of “adjacent waters.”

Under the proposal and the final rule, “adjacent waters” are jurisdictional based on the conclusion that they have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas, and there is no need for additional analysis. Some commenters wanted a case-specific analysis for all “adjacent waters” as they believed that the waters would not individually have a significant nexus to an adjacent “water of the United States,” while others noted that their functional relationship to the downstream traditional navigable waters, interstate waters, or the territorial seas warranted the conclusion that they were all jurisdictional. Based on a review of the science, the agencies’ expertise and experience, and the law, the agencies determined that “adjacent waters,” as defined, alone or in combination with other covered “adjacent waters” in a watershed have a significant nexus to a traditional navigable water, interstate water or the territorial seas and therefore are “waters of the United States” without the need for any additional analysis. However, the rule also provides for case-specific analysis of some waters that do not meet the definition of “neighboring” established by the rule. See section IV.H.

The proposal included wetlands, ponds, lakes, and impoundments that contribute flow, directly or indirectly, to the downstream traditional navigable waters, interstate waters, or the territorial seas in the definition of “tributary.” Some commenters expressed concern that since such waters generally do not have both an ordinary high water mark and a bed and banks, the definition of tributary was contradictory and confusing. The agencies sought comment on whether to treat these waters as “adjacent waters” instead of tributaries, since they not

only contribute flow, but they also border or are contiguous to the waters to which they contribute flow. The SAB in particular commented that the agencies “may want to consider whether flow-through lentic systems should be included as “adjacent waters” and wetlands, rather than as tributaries.” SAB 2014b at 2. In light of the comments and to provide additional clarity, the agencies revised the definitions of “adjacent” and “tributary” to include these waters as “adjacent.”

Under the existing rule, there is no definition for the term “neighboring,” and the public commented that not having a definition created a lack of clarity and inconsistent field practices across the nation. In the proposal, “neighboring” was defined to include waters located within the riparian area or floodplain of a traditional navigable water, interstate water, territorial sea, impoundment, or tributary; waters with a shallow subsurface hydrologic connection to a jurisdictional water; and waters with a confined surface hydrologic connection to a jurisdictional water. Although the definitions were scientifically-based for the terms “riparian area” and “floodplain” to define the lateral reach of the term “neighboring,” some commenters indicated that the proposed definitions to clarify neighboring were not clear. Those commenters requested that a specific floodplain interval or other limitation should be established to more clearly identify the outer limit of neighboring. Some commenters stated that the proposed definition of “neighboring” was unclear, while other commenters found the definition helped clarify CWA jurisdiction and were supportive of including a broad definition, based on ecological interconnectedness.

Some commenters stated that the proposed definitions of “riparian area” and “floodplain” were vague or ambiguous, broad or effectively limitless, beyond the agencies’ authority or difficult or impossible to implement in the field. Other commenters were supportive of using the riparian area as a basis for adjacency. Some commenters asked why the agencies were proposing a new definition of “floodplain” that was inconsistent with the definition used by other Federal agencies like NRCS or FEMA. Some commenters suggested that if the agencies use floodplains as a means to define “neighboring,” it should be limited to the area inundated by the 2-year, 5-year, 10-year, or 20-year flood, while other commenters supported the use of the 100-year floodplain as a component of

“neighboring.” Some commenters supported including all wetlands and other waters in the 100-year floodplain as categorically jurisdictional. Other commenters requested that floodplain size be based on tributary size, while others suggested that it should be based on soil and geologic features, and some suggested the use of the FEMA flood zone maps. Some commenters stated that “reasonable proximity” was neither defined nor clarified adjacency, noting that adjacency should not apply to waters separated from a “water of the United States” by great distances.

In response to comments and to provide greater clarity and consistency, in the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific boundaries from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. In the proposal, the agencies requested comment on whether the rule should provide greater specificity with regard to how the agencies will determine if a water is located in the floodplain of a jurisdictional water. 79 FR 22209. As recommended by the public and based on science, the agencies’ boundaries for “neighboring” are based largely on use of the 100-year floodplain. The agencies concluded that the use of the riparian area was unnecessarily complicated and that as a general matter, waters in the riparian area will also be in the 100-year floodplain. Further, should the riparian area on occasion extend beyond the 100-year floodplain, the agencies have the ability to perform a case-specific significant nexus analysis on a water out to 4,000 feet from the ordinary high water mark or high tide line of a traditional navigable water, interstate water, the territorial sea, impoundment, or tributary. The agencies have drawn these lines based on their technical expertise and experience in order to provide a rule that is practical to understand and implement and protects those waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Because science indicates that connectivity is on a gradient, the agencies have also identified limited circumstances in which waters that do not meet the definition of “neighboring” may be determined on a case-specific basis to have a significant nexus. See section IV.I.

First, the rule establishes as “neighboring” waters that occur within 100 feet from traditional navigable

waters, interstate waters, the territorial seas, impoundments, and tributaries.

Second, the rule utilizes a specific floodplain and also establishes maximum distances for purposes of “neighboring.” Studies have found that waters within the floodplain are dynamically connected and frequently interact with the downstream traditional navigable water, interstate water, territorial sea, impoundment, or tributary. Some commenters indicated that a specific floodplain or other designation should be set to define the outer boundary of “neighboring.” Further, some commenters requested that the 100-year floodplain designation be used to define the outer boundary of adjacency because the public understands this concept. Several commenters recommended that FEMA or NRCS maps be used to support the analysis as these maps are easily accessible to the public. Because FEMA maps exist for many areas of the country and the NRCS Soil Survey maps do as well, the agencies decided that defining “neighboring” based in part on a particular floodplain or recurrence interval was a reasonable means of ensuring the consistency and certainty that is important to the public and for implementation of the CWA. In drawing lines, the agencies chose the 100-year floodplain in part because FEMA and NRCS together have generally mapped large portions of the United States, and these maps are publicly available, well-known and well-understood.

Because the 100-year floodplain can be very wide in some areas of the country, particularly near large rivers, the agencies chose to provide increased clarity and certainty while ensuring that waters that provide important functions significantly affecting the chemical, physical, and biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas are protected by establishing a 1,500 foot maximum distance for neighboring waters in the rule. Waters within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark are adjacent without regard to the presence of berms or other barriers. However, because the science demonstrates that floodplain waters provide important functions for downstream waters, the agencies have established a provision under paragraph (a)(8) for case-specific significant nexus evaluations of waters located in the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas beyond 1,500 feet.

The rule also establishes a separate bright line for including as

jurisdictional those waters that occur within 1,500 feet of tidally-influenced traditional navigable waters or the territorial seas.

The proposal defined “neighboring” to include waters with a surface connection to jurisdictional waters and some commenters recommended eliminating surface hydrologic connectivity as a basis for adjacency. The definition of neighboring does not include a provision defining “neighboring” based on a surface hydrologic connection. However, waters with confined surface hydrologic connections are considered adjacent where they are bordering, contiguous, or neighboring a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. For example, a water with a confined surface hydrologic connection to a traditional navigable water that is 1,200 feet from the high tide line of that water would meet the definition of neighboring and be considered an adjacent water. In circumstances where a water does not meet the definition of neighboring but is located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, or within 4,000 feet of a jurisdictional water, a confined surface hydrologic connection may be an important factor in evaluating a case-specific significant nexus under paragraph (a)(8). See section H. below.

The proposal defined “neighboring” to include waters connected with a shallow subsurface connection, and some commenters recommended eliminating subsurface hydrologic connectivity as a basis for adjacency. For example, some commenters asserted that, because the CWA does not apply to groundwater, the agencies do not have the authority to assert jurisdiction over waters connected to other “waters of the United States” via a shallow subsurface hydrologic connection. Some commenters were concerned that the distinction between “groundwater” and a “shallow subsurface connection” was unclear and questioned whether using a shallow subsurface connection as a basis for adjacency is contradictory to excluding groundwater—including groundwater drained through subsurface drainage systems—as a “water of the United States.” Some commenters supported use of shallow subsurface connectivity for adjacency, since the significant nexus test would be employed to make the determination of jurisdiction. Several commenters suggested that the rule should protect groundwater and shallow subsurface flow, due to its connectivity to other “waters of the United States” and

particularly since altering it could affect the downstream waters. A few commenters simply requested clarifications regarding issues such as how to determine whether a subsurface connection exists; the meaning of “shallow;” distinguishing between “shallow” and “deep;” whether there were any boundaries on adjacency via hydrologic connectivity; and determining whether the connection was “sufficient” to establish adjacency. In order to provide more certainty to the public, the rule does not include a provision defining neighboring based on shallow subsurface flow, though such flow may be an important factor in evaluating a water on a case-specific basis under paragraph (a)(8), as appropriate.

Some commenters expressed concern that the agencies’ proposed definition of “neighboring,” “riparian area,” and “floodplain” would mean that all land within the floodplain or riparian area would become regulated. In fact, only waters, not land, in the floodplain or riparian area would have been considered adjacent under the proposed rule. Similarly, under the final rule, only waters, not land, are adjacent. In response, the agencies have eliminated the definitions of floodplain and riparian area and have provided a definition of neighboring which is clear that only waters in specified circumstances may be “waters of the United States.”

The agencies also eliminated a parenthetical from the existing “adjacent wetlands” regulatory provision. The phrase “other than waters that are themselves wetlands” was intended to preclude asserting CWA jurisdiction over wetlands that were simply adjacent to a non-jurisdictional wetland. Such waters do not meet the definition of “adjacent” under the rule since waters must be adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary, so the phrase is unnecessary and confusing. With this change, the agencies are protecting all waters that meet the definition of “adjacent” as “waters of the United States,” and eliminating confusion caused by the parenthetical. For example, where the 100-year floodplain is greater than 1,500 feet, all wetlands within 1,500 feet of the tributary’s ordinary high water mark are jurisdictional because they are “neighboring” to the tributary, regardless of the wetlands’ position relative to each other.

Some commenters stated that the proposed rule was an expansion of jurisdiction because it would change the

provision from “adjacent wetlands” to “adjacent waters.” The agencies acknowledge that under the existing regulation, the adjacency provision applied only to wetlands adjacent to “waters of the United States.” However, also under the existing regulation, “other waters” (such as intrastate rivers, lakes and wetlands that are not otherwise jurisdictional under other sections of the rule) could be determined to be jurisdictional if the use, degradation or destruction of the water could affect interstate or foreign commerce. This provision of the existing regulation reflected the agencies’ interpretation at the time of the jurisdiction of the CWA to extend to the maximum extent permissible under the Commerce Clause of the Constitution. Therefore, while the language of the specific adjacency provision in the final rule may have changed from wetlands to waters, that does not represent an expansion of jurisdiction as a whole in comparison to the existing regulation, since adjacent non-wetland waters would have been subject to jurisdiction under the “other waters” provision. The final rule does not protect all waters that were protected under the “other waters” provision of the existing regulation, and therefore the inclusion of adjacent ponds, for example, in the “adjacent waters” provision of the final rule does not reflect an overall expansion of jurisdiction when compared to the existing regulation.

3. How do science and law support the rule?

Based on a review of the scientific literature and the agencies’ expertise and experience the agencies determined that the categories of waters discussed below are integrally linked to the chemical, physical, or biological functions of waters to which they are adjacent and downstream to the traditional navigable waters, interstate waters or the territorial seas. Therefore, the agencies determined that the waters defined as adjacent have a significant nexus with traditional navigable waters, interstate waters or the territorial seas and are thus “waters of the United States.” Additional information, including citations, can be found in section III of the preamble, the Science Report, and the Technical Support Document for the rule.

a. Waters that are Bordering or Contiguous

As discussed in section III above, wetlands, ponds, lakes, oxbows, impoundments, and similar water features that are bordering or contiguous

perform a myriad of critical chemical and biological functions associated with the downstream traditional navigable waters, interstate waters, or the territorial seas. Such waters are integrally linked with the jurisdictional waters to which they are adjacent. Because of their close physical proximity to nearby jurisdictional waters, bordering or contiguous waters readily exchange their waters through the saturated soils surrounding the traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary or through surface exchange. This commingling of waters allows bordering or contiguous waters to both provide chemically transformed waters to streams and to absorb excess stream flow, which in turn can significantly affect downstream traditional navigable waters, interstate waters, or the territorial seas. The close proximity also allows for the direct exchange of biological materials, including organic matter that serves as part of the food web of downstream traditional navigable waters, interstate waters, or the territorial seas. Waters that are bordering or contiguous are often located on the floodplain or within the riparian area of the waters to which they are adjacent. Bordering or contiguous waters include those that directly abut a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. The Science Report and the Technical Support Document demonstrate that such waters are physically, chemically, and biologically integrated with downstream traditional navigable waters, interstate waters, or the territorial seas and significantly affect their integrity.

b. Waters Separated From Other “Waters of the United States” by Constructed Dikes or Barriers, Natural River Berms, Beach Dunes and the Like

Adjacent waters separated from a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary by constructed dikes or barriers, natural river berms, beach dunes, and the like continue to have a significant effect on downstream traditional navigable waters, interstate waters, or the territorial seas, either alone or in combination with other “adjacent waters.” Such waters continue to have a hydrologic connection to downstream waters. This is because constructed dikes or barriers, natural river berms, beach dunes, and the like typically do not block all water flow. This hydrologic connection can occur via

seepage, or the flow of water through the soil pores, or via over-topping, where water from the nearby traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary periodically overtops the berm or other similar feature. Berm-like landforms known as natural levees occur naturally and do not isolate adjacent wetlands from the streams that form them. Natural levees and the wetlands and waters behind them are part of the floodplain. Natural levees are discontinuous, which allows for a hydrologic connection to the stream or river via openings in the levees and thus the periodic mixing of river water and backwater. Man-made levees and similar structures also do not isolate “adjacent waters.” Waters, including wetlands, separated from a jurisdictional water by a natural or man-made berm serve many of the same functions as other “adjacent waters.” Furthermore, even in cases where a hydrologic connection may not exist, there are other important considerations, such as chemical and biological functions, that result in a significant nexus between the adjacent wetlands or waters and the nearby “waters of the United States,” and traditional navigable waters, interstate waters, or the territorial seas. On this point, Justice Kennedy stated: “In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps’ definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.” *Rapanos* at 775. For instance, covered adjacent waters behind berms can still serve important water quality functions, serving to filter pollutants and sediment before they reach downstream waters. Wetlands and open waters behind berms, where the system is extensive, can help reduce the impacts of storm surges caused by hurricanes. Such “adjacent waters,” including wetlands, separated from waters by berms and the like maintain ecological connection with those waters. It is not the existence of the dike, levee, and the like that makes these waters jurisdictional. Adjacent waters separated from the tributary network by constructed dikes or barriers, natural river berms, beach dunes, and the like continue to have a hydrologic connection to downstream waters.

Waters behind berms and the like can significantly affect the chemical, physical, and biologic integrity of traditional navigable waters, interstate waters, or the territorial seas.

c. Waters Within 100 Feet

All wetlands, ponds, lakes, oxbows, impoundments, and similar water features that are located in whole or in part within 100 feet of the ordinary high water mark of a jurisdictional water perform a myriad of critical chemical, physical, and biological functions associated with the downstream traditional navigable water, interstate water or the territorial seas and therefore the agencies have determined that they are “neighboring” and thus “waters of the United States.” Waters within 100 feet of a jurisdictional water are often located within the riparian area and are often connected via surface and shallow subsurface hydrology to the water to which they are adjacent. While the SAB was clear that distance is not the only factor that influences connections and their effects downstream, due to their close proximity to jurisdictional waters, waters within 100 feet are often located within a landscape position that allows for them to receive and process surface and shallow subsurface flows before they reach streams and rivers. These waters individually and collectively affect the integrity of downstream waters by acting primarily as sinks that retain floodwaters, sediments, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters. Wetlands and open waters within close proximity of jurisdictional waters improve water quality through assimilation, transformation, or sequestration of nutrients, sediment, and other pollutants that can affect the integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. These waters, including wetlands, also provide important habitat for aquatic-associated species for forage, breed, and rest.

In order to provide greater clarity and consistency and based on a review of the science and the agencies’ expertise and experience, the agencies identified a 100 foot threshold for neighboring waters to a traditional navigable water, interstate water, territorial sea, tributary, or impoundment. Further, the agencies determined that there is a significant nexus with the downstream traditional navigable waters, interstate waters, or the territorial seas, and these “adjacent waters” are “waters of the United States.” With respect to provision of water quality benefits downstream, non-

floodplain waters within close proximity of the stream network often are able to have more water quality benefits than those located at a distance from the stream. Many studies indicate that the primary water quality and habitat benefits will generally occur within a several hundred foot zone of a water. In addition, the scientific literature indicates that to be effective, contaminant removal needs to occur at a reasonable distance prior to entry into the downstream traditional navigable waters, interstate waters, or the territorial seas. Some studies also indicate that fish, amphibians (e.g., frogs, toads), reptiles (e.g., turtles), and small mammals (e.g., otters, beavers, etc.) will use at least a 100 foot zone for foraging, breeding, nesting, and other life cycle needs.

Based on a review of the scientific literature and the agencies’ expertise and experience, there is clear evidence that the identified waters within 100 feet of the ordinary high water mark of a jurisdictional water, even when located outside the floodplain, perform critical processes and functions discussed in section III above. All waters within 100 feet of a jurisdictional water significantly affect the chemical, physical, or biological integrity of the waters to which they are adjacent, and those waters in turn significantly affect the chemical, physical, or biological integrity of the downstream traditional navigable waters, interstate waters, or the territorial seas. The agencies established a 100 foot threshold from the water’s lateral limit in the definition of neighboring because, based on the agencies’ expertise and experience implementing the CWA and in light of the science, the agencies concluded this was a reasonable and practical boundary within which to conclude the waters clearly significantly affected the integrity of traditional navigable waters, interstate waters, or the territorial seas, and these “adjacent waters” are “waters of the United States.”

d. Floodplain Waters Within 1,500 Feet

As discussed in section III above, wetlands and open waters that are neighboring perform a myriad of critical chemical and biological functions associated with the downstream traditional navigable waters, interstate waters, or the territorial seas. The scientific literature supports that wetlands and open waters in floodplains are chemically, physically, and biologically connected to downstream traditional navigable waters, interstate waters, or the territorial seas and significantly affect the integrity of such waters. The Science

Report concludes that wetlands and open waters located in “floodplains are physically, chemically and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter.” Science Report at ES–2 to ES–3. Such waters act as the most effective buffer to protect downstream waters from nonpoint source pollution (such as nitrogen and phosphorus), provide habitat for breeding fish and aquatic insects that also live in streams, and retain floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters.

For waters in the 100-year floodplain within 1,500 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary, the agencies determine there is a significant nexus with the downstream traditional navigable waters, interstate waters, or the territorial seas and these waters are critical to protect the downstream waters. Based on a review of the scientific literature, the agencies’ technical expertise and experience, and the implementation value of drawing clear lines, the rule establishes a boundary for floodplain waters to meet the definition of “neighboring” and be “waters of the United States” by rule. This boundary was established in order to protect vitally important waters within a watershed while at the same time providing a practical and implementable rule. The agencies are not determining that waters in the floodplain farther than 1,500 feet from the ordinary high water mark never have a significant nexus. Rather, the agencies are using their technical expertise to promulgate a practical rule that draws reasonable boundaries in order to protect the waters that most clearly have a significant nexus while minimizing uncertainty about the scope of “waters of the United States.” Because waters beyond these boundaries may have a significant nexus, the rule also establishes areas in which a case-specific significant nexus determination must be made. See section IV.H.

e. Waters Within 1,500 Feet of Tidally-Influenced Traditional Navigable Waters or the Territorial Seas or the Great Lakes

Many tidally-influenced waters do not have floodplains, so the agencies

include a separate provision within the definition of “neighboring” to protect the “adjacent” waters that have a significant nexus to tidally-influenced traditional navigable waters or the territorial seas or the Great Lakes. Under *Riverside Bayview* and Justice Kennedy’s opinion in *Rapanos*, waters adjacent to traditional navigable waters, including the territorial seas, are “waters of the United States.” Because the connection to a tidally-influenced traditional navigable water, the territorial seas, or the Great Lakes is so close, the rule defines “neighboring” to include waters within 1,500 feet of the high tide line or the ordinary high water mark of the Great Lakes. Wetlands, ponds, lakes, oxbows, impoundments, and similar water features within 1,500 feet of these waters are physically connected to such waters by surface and shallow subsurface flow. As demonstrated in section III above, these waters perform a myriad of critical chemical and biological functions associated with these nearby waters to which they are adjacent.

These waters in combination significantly affect the integrity of the connected tidally influenced traditional navigable water or the territorial seas or the Great Lakes by acting primarily as sinks that retain floodwaters, sediments, nutrients, and contaminants that could otherwise negatively impact the condition or function of those waters. Like floodplain waters, the scientific literature supports that wetlands and other similar waters within close proximity improve water quality through assimilation, transformation, or sequestration of nutrients, sediment, and other pollutants that can affect downstream water quality. These waters also provide important habitat for aquatic-associated species to forage, breed, and rest in.

For example, wetlands dominated by grass-like vegetation that occur in depressional areas between sand dunes or beach ridges along the territorial seas and the Great Lakes shoreline are dependent upon these waters for their water source. The waters, including wetlands, generally form when water levels of the territorial seas fall or the Great Lakes drop, creating swales that support a diverse mix of wetland vegetation and many endangered and threatened species. Many studies demonstrate that these waters have been shown to act in concert with the rising and lowering of the tide, and that the critical functions provided by these waters are similar and play an important role in maintaining the chemical, physical, or biological integrity of the nearby traditional navigable waters,

interstate waters, or the territorial seas because of the hydrological and ecological connections to and interactions with those waters.

Science demonstrates that distance is a factor in the connectivity and the strength of connectivity of wetlands and open waters to downstream waters. Thus, waters that are more distant generally have less opportunity to be connected to downstream waters. Wetlands and open waters closer to the stream network generally will have greater hydrologic and biological connectivity than waters located farther from the same network. For instance, waters that are more closely proximate have a greater opportunity to contribute flow. Via their hydrologic connectivity, they also have chemical connectivity to and effects on these downstream waters and are more likely to impact water quality due to their close distance. Waters more closely located to these waters are also more likely to be biologically connected to such waters more frequently and by more species, including amphibians and other aquatic animals. Because tidally-influenced traditional navigable waters, the territorial seas, and the Great Lakes are generally much larger in size than other jurisdictional waters, the agencies believe that a 1,500 foot threshold is a reasonable distance to capture most wetlands and open waters that are so closely linked to these waters that they can properly be considered adjacent as neighboring waters.

Based on a review of the scientific literature and the agencies’ expertise and experience, there is clear evidence waters within 1,500 feet of these waters, even when located outside the floodplain, perform critical processes and functions discussed in section III above. The agencies established a 1,500 foot threshold from the water’s lateral limit, which would be either the high tide line or the ordinary high water mark, in the definition of neighboring because, based on the agencies’ expertise and experience implementing the CWA and in light of the science, the agencies concluded this was a reasonable and practical boundary within which to conclude the waters most clearly significantly affected the integrity of the traditional navigable water or the territorial seas, and these covered adjacent waters are “waters of the United States.” Waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters located more than 1,500 feet and less than 4,000 feet from the ordinary high water mark of a traditional navigable water, interstate water, the territorial

seas, an impoundment, or a tributary, may still be determined to have a significant nexus on a case-specific basis under paragraph (a)(8) of the rule and therefore be a “water of the United States.” See section IV.H.

H. Case-Specific “Waters of the United States”

The rule establishes two exclusive circumstances under which case-specific determinations will be made for whether a water has a “significant nexus” and is therefore a “water of the United States.” The proposed rule included a broad provision that allowed for a case-specific determination of significant nexus for any water that was not categorically jurisdictional or excluded. Many commenters expressed concern that such a broad opportunity for case-specific “waters of the United States” determinations would lead to too much uncertainty about the jurisdictional status of waters in broad areas throughout the country. The agencies have greatly reduced the extent of waters subject to this individual review by carefully incorporating the scientific literature and by utilizing agency expertise and experience to draw boundaries. The rule provides for case-specific determinations under more narrowly targeted circumstances based on the agencies’ assessment of the importance of certain specified waters to the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.

First, the rule identifies at paragraph (a)(7) five subcategories of waters (Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) that the agencies have determined are “similarly situated” for purposes of a significant nexus determination. Second, the rule identifies at paragraph (a)(8) specific circumstances under which waters will be subject to a case-specific significant nexus determination but for which the agencies have not made a “similarly situated” determination: Waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundments, or tributaries, as defined. If any water meets the definition of “adjacent” waters it is jurisdictional under paragraph (a)(6) and no case-specific significant nexus is required. Waters that do not fall within the six categorically jurisdictional waters identified in paragraph (a)(1) through

(a)(6) of the rule or within these two case-specific provisions are not “waters of the United States.”

This section first discusses the five subcategories of waters that the agencies determine are “similarly situated” for purposes of a significant nexus determination; second, the 100-year floodplain and 4,000 foot boundaries under which waters will be subject to a case-specific significant nexus determination but for which the agencies have not made a “similarly situated” determination; third, the definition of “significant nexus” and how the case-specific significant nexus determinations will be made under these two provisions; and, finally, the revisions made to the rule with respect to case-specific determinations and major comments.

1. Waters Determined To Be “Similarly Situated” by Rule for Which a Case-Specific Significant Nexus Determination Is Required

In the rule, paragraph (a)(7) specifies the subcategories of waters (Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands) that, if they are not otherwise jurisdictional under paragraphs (a)(1) through (a)(6), the agencies determine to be “similarly situated” by rule. In the proposal the agencies sought comment on a number of options to address remaining waters that did not fit within the jurisdictional categories, including whether to conclude that other waters were “similarly situated” in certain areas of the country or whether to conclude that specified subcategories of waters were jurisdictional. 79 FR 22215, 22216. The agencies concluded that waters within the five subcategories were “similarly situated” in the areas of the country in which they are located. The rationale for this determination is discussed above in Section III. Under paragraph (a)(7), Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands are jurisdictional when they have a significant nexus to a traditional navigable water, interstate water, or the territorial seas. Waters subject to normal farming, silviculture, and ranching activities that are within these subcategories will be assessed consistent with this provision of the rule. Waters in these subcategories are not jurisdictional as a class under the rule. However, because the agencies determined that these subcategories of waters are “similarly situated,” the waters within the specified subcategories that are not otherwise

jurisdictional under paragraph (a)(6) of the rule must be assessed in combination with all waters of the same subcategory in the region identified by the watershed that drains to the nearest point of entry of a traditional navigable water, interstate water, or the territorial seas (hereinafter referred to as the point of entry watershed).

When performing a case-specific significant nexus evaluation for a water in the paragraph (a)(7) subcategories, the rule establishes which waters must be considered in combination. The similarly situated waters identified in the subparagraphs will be combined with other waters in the same subparagraph located in a single point of entry watershed. For example, under paragraph (a)(7) only western vernal pools can be analyzed with other western vernal pools in the same point of entry watershed. Waters identified in the subparagraphs that are otherwise jurisdictional under the rule cannot be considered in combination with paragraph (a)(7) waters for purposes of a case-specific significant nexus determination under paragraph (a)(7). Individual waters of the specified subcategories may be jurisdictional under other paragraphs of this rule (e.g., a Prairie pothole that sits on a state border is an interstate water under paragraph (a)(2) or a western vernal pool that meets the definition of adjacent under paragraph (a)(6)). Where those individual waters are jurisdictional under paragraph (a)(1) through (a)(6) by rule, no case-specific significant nexus analysis is required. The rule also states that waters in paragraph (a)(7) shall not be combined with waters jurisdictional under paragraph (a)(6). Essentially, while Prairie potholes are an identified subcategory under paragraph (a)(7), that identification does not affect a Prairie pothole that borders a covered tributary and is jurisdictional as an adjacent water under paragraph (a)(6). Additionally, a Prairie pothole that is jurisdictional under paragraph (a)(6) cannot be combined with Prairie potholes that require a case-specific jurisdictional analysis under paragraph (a)(7) since “adjacent waters” have already been determined to have a significant nexus by rule. Finally, waters within the specified subcategories in paragraph (a)(7) are assessed under paragraph (a)(7) not under paragraph (a)(8); waters within the specified subcategories that are within the 100-year flood plain of a traditional navigable water, interstate water, or the territorial seas or within the 4,000 foot boundary established for case-specific determinations under

paragraph (a)(8) remain “similarly situated” waters under paragraph (a)(7). These similarly situated waters are evaluated in combination for their effect on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. Additional details about the case-specific significant nexus analysis are found in section 4 below.

2. Waters Within the 100-Year Floodplain of a Traditional Navigable Water, Interstate Water, or the Territorial Seas and Waters Within 4,000 Foot Boundary for Which a Case-Specific Significant Nexus Determination Is Required

Paragraph (a)(8) in the rule specifies that a water that does not otherwise meet the definition of adjacency is evaluated on a case-specific basis for significant nexus under this paragraph where it is located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within 4,000 feet of the high tide line or ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. Although these waters are not considered similarly situated by rule, waters under this paragraph can be determined on a case-specific basis to be similarly situated. This is a change from the proposal which would have allowed for a similarly situated analysis and significant nexus determination for any water, anywhere in the region. Under the rule, the waters specified in paragraph (a)(7) and waters that meet the requirements in paragraph (a)(8) are the only waters for which a case-specific significant nexus determination may be made.

Under paragraph (a)(8), only waters that are within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within the 4,000 foot boundary can be evaluated on a case-specific basis for significant nexus to a traditional navigable water, interstate water, or the territorial seas. If a portion of the water is located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or 4,000 feet of the ordinary high water mark or high tide line of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary, the entire water will be considered to be within the boundaries for paragraph (a)(8) and will undergo a case-specific significant nexus determination. Under this provision, if the 100-year floodplain of a traditional navigable water,

interstate water, or the territorial seas extends beyond 4,000 feet of the ordinary high water mark, a water, that is not otherwise jurisdictional under the rule, within that floodplain will be evaluated under the 100-year floodplain boundary of paragraph (a)(8). A water within the boundaries must be evaluated on a case-specific basis for not only a significant nexus but also for a determination of whether there are any waters with which the waters is similarly situated. Waters identified in paragraph (a)(8) may not be combined with waters identified in paragraph (a)(6) for purposes of the significant nexus analysis, but may be combined with similarly situated waters located in the same point of entry watershed. If waters identified in paragraph (a)(8) also meet the definition of adjacency under paragraph (a)(6), they are jurisdictional as "adjacent waters" and do not need a case-specific significant nexus analysis. Under paragraph (a)(8), for example, the agencies would evaluate on a case-specific basis whether a low-centered polygonal tundra and patterned ground bog in an area with a small floodplain and located beyond the 1,500 foot boundary but within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas or within the 4,000 foot boundary, or a wetland in which normal farming, ranching, or silviculture activities occur, as those terms are used in section 404(f) of the Clean Water Act and its implementing regulations, has a significant nexus as defined in the rule.

Waters identified in the subcategories in paragraph (a)(7) are evaluated under paragraph (a)(7) only; the provisions of paragraph (a)(8), including the boundaries in paragraph (a)(8), do not apply to paragraph (a)(7) waters. The significant nexus analysis for waters under paragraph (a)(8) will then consider the waters individually or, if it is determined that there are similarly situated waters, as a group of waters within a point of entry watershed for their effect on the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.

Some commenters asked how wetlands underlain by permafrost would be treated under this rule. Waters subject to case-specific review under paragraph (a)(8) will include areas determined to meet the technical definition of "wetlands" because they have the required hydrology, vegetation, and soils. The presence of permafrost is not itself determinative of whether a particular area satisfies the three parameter requirement needed to be wetlands under the rule. This is true

under existing regulations and remains unchanged in this rule. Because the definition of wetland does not change under the rule, the agencies do not anticipate the rule will alter the current scope of CWA jurisdiction over wetlands underlain by permafrost.

a. Summary of Rationale for Case-Specific Significant Nexus Analysis Within 100-Year Floodplain of a Traditional Navigable Water, Interstate Water, or the Territorial Seas

As discussed in Section III, above, the scientific literature supports that wetlands and open waters in floodplains are physically, chemically, and biologically connected to downstream traditional navigable waters, interstate waters, or the territorial seas and significantly affect the integrity of such waters. The Science Report concludes that wetlands and open waters located in "floodplains are physically, chemically and biologically integrated with rivers via functions that improve downstream water quality, including the temporary storage and deposition of channel-forming sediment and woody debris, temporary storage of local ground water that supports baseflow in rivers, and transformation and transport of stored organic matter." Science Report at ES-2 to ES-3. As described in the Science Report and the Technical Support Document, such waters act as the most effective buffer to protect downstream waters from nonpoint source pollution (such as nitrogen and phosphorus), provide habitat for breeding fish and aquatic insects that also live in streams, and retain floodwaters, sediment, nutrients, and contaminants that could otherwise negatively impact the condition or function of downstream waters. As discussed above, in defining waters as adjacent, and therefore categorically jurisdictional, the agencies established a 1,500 foot boundary for waters located within the 100-year floodplain of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary in order to protect vitally important waters while at the same time providing a practical and implementable rule. In light of the science on the functions provided by floodplain waters and wetlands, waters and wetlands within the 100-year floodplain of traditional navigable waters, interstate waters, or the territorial seas are likely to provide those functions for traditional navigable waters, interstate waters, or the territorial seas. However, because the 100-year floodplain of a traditional navigable water can, in some case be quite large, the agencies concluded it

was reasonable to subject waters and wetlands in the 100-year floodplain that are beyond 1,500 feet of the ordinary high water mark, and therefore do not meet the definition of "neighboring," to a case-specific significant nexus analysis rather than concluding that such waters are categorically jurisdictional. This inclusion of a case-specific analysis for such floodplain waters is supported by the SAB. The SAB concluded that "distance should not be the sole indicator used to evaluate the connection of 'other waters' to jurisdictional waters." SAB 2014b at 3. In allowing the case-specific evaluation of waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas that do not meet the definition of adjacency, the agencies are allowing for the functional relationship of those floodplain waters to be considered regardless of distance. The SAB also supported the Science Report's conclusion that "the scientific literature strongly supports the conclusions that streams and 'bidirectional' floodplain wetlands are physically, chemically, and/or biologically connected to downstream navigable waters; however, these connections should be considered in terms of a connectivity gradient." SAB 2014a at 1. In addition, the SAB noted, "the literature review does substantiate the conclusion that floodplains and waters and wetlands in floodplain settings support the physical, chemical, and biological integrity of downstream waters." *Id.* at 3.

The agencies do not anticipate that there will be numerous circumstances in which this provision will be utilized because relatively few traditional navigable waters will have floodplains larger than 4,000 feet (the other threshold in paragraph (a)(8) for waters regardless of floodplain). Further, the agencies recognize that extensive areas of the nation's floodplains have been affected by levees and dikes which reduce the scope of flooding. In these circumstances, the scope of the 100-year floodplain is also reduced and is reflected in FEMA mapping used by the agencies. In circumstances where there is little or no alteration of the floodplain and it remains relatively broad, the agencies will explicitly consider distance between the water being evaluated and traditional navigable water, interstate water, or the territorial seas when making a case-specific significant nexus determination. Based on the science concerning the important functions provided by floodplain waters and wetlands, the agencies established this provision to ensure that truly

important waters may still be protected on a case-specific basis. By using the 100-year floodplain and limiting the provision to traditional navigable waters, interstate waters, or the territorial seas, the agencies are reasonably balancing the protection of waters that may have a significant nexus with the goal of providing additional certainty.

b. Summary of Rationale for Case-Specific Significant Nexus Analysis Within 4,000 Foot Boundary

The agencies establish a provision in the rule for case-specific significant nexus determinations because the agencies concluded that some waters located beyond the distance limitations established for "adjacent waters" can have significant chemical, physical, and biological connections to and effects on traditional navigable waters, interstate waters, or the territorial seas. The agencies reasonably identified the 4,000 foot boundary for these case-specific significant nexus determinations by balancing consideration of the science and the agencies' expertise and experience in making significant nexus determinations with the goal of providing clarity to the public while protecting the environment and public health. The agencies' experience has shown that the vast majority of waters where a significant nexus has been found, and which are therefore important to protect to achieve the goals of the Act, are located within the 4,000 foot boundary. Moreover, because of the unique status under the CWA of traditional navigable waters, interstate waters, and the territorial seas, the 100-year floodplain boundary for these waters provides another means of identifying on a case-specific basis those waters that significantly affect traditional navigable waters, interstate waters or the territorial seas. The agencies' balancing of these considerations is consistent with the statute and the Supreme Court opinions. The agencies decided that it is important to promulgate a rule that not only protects the most vital of our Nation's waters, but one that is practical and provides sufficient boundaries so that the public reasonably understands where CWA jurisdiction ends.

The agencies' decision to establish a provision that authorizes case-specific significant nexus analysis for waters within 4,000 feet is based on a number of factors. These waters may be located within the floodplain of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. Section IV.G. and the Technical Support Document discuss

the importance of floodplain waters on the chemical, physical, and biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas. For purposes of clarity and to provide regulatory certainty, the agencies decided to use distance boundaries within the 100-year floodplain to define adjacency for floodplain waters. Under the rule, the only floodplain waters that are specifically identified as being jurisdictional as "adjacent" are those located in whole or in part within the 100-year floodplain and not more than 1,500 feet of the ordinary high water mark of jurisdictional waters.

Similarly, due to the many functions that waters located within 4,000 feet of the high tide line of a traditional navigable water or the territorial seas provide and their often close connections to the surrounding traditional navigable waters, science supports the agencies' determination that such waters are rightfully evaluated on a case-specific basis for significant nexus to a traditional navigable water or the territorial seas. Waters within 4,000 feet of the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary may fall within the riparian areas of such waters. As discussed in section IV.G., in response to comments regarding the uncertainty of the term "riparian area," the agencies removed the term from the definition of "neighboring." However, the agencies continue to recognize that science is clear that wetlands and open waters in riparian areas individually and cumulatively can have a significant effect on the chemical, physical, or biological integrity of downstream waters. Thus, the rule allows for a case-specific determination of significant nexus for waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary.

The agencies have always recognized that adjacency is bounded by proximity, and the rule adds additional clarity to adjacency by bounding what can be considered neighboring. The science is clear that a water's proximity to downstream waters influences its impact on those waters. The Science Report states, "[s]patial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters." Science Report at ES-11.

Generally, waters that are closer to a jurisdictional water are more likely to be connected to that water than waters that are farther away. A case-specific analysis for waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary allows such waters to be considered jurisdictional only where they meet the significant nexus requirements. Even where not within a 100-year floodplain, waters within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary can have significant chemical, physical, and biological connections with traditional navigable waters, interstate waters, or the territorial seas.

As noted previously, in response to comments concerned that there were no bounds in the proposed rule on how far a surface hydrologic connection could be for purposes of adjacency, the agencies did not include surface hydrologic connections as its own factor for determining adjacency in the final rule. Such connections, however, are relevant in a case-specific significant nexus determination under paragraph (a)(8). For example, waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary that contribute confined surface flow to a downstream water can have important hydrologic connections to and effects on that downstream water such as the attenuation and cycling of nutrients that would otherwise effect downstream water quality.

The agencies' decision to establish the case-specific provision at paragraph (a)(8), including the boundaries, was also informed by the knowledge that waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary can have a confined surface or shallow subsurface connection to such a water. In order to provide the clarity and certainty that many commenters requested regarding "adjacent waters," the rule does not define "neighboring" to include all waters with confined surface or shallow subsurface connections.

However, the agencies recognize that the science demonstrates that waters with a confined surface or shallow subsurface connection to jurisdictional

waters can have important effects on downstream waters. For purposes of a case-specific significant nexus analysis under the rule, a shallow subsurface hydrologic connection is lateral water flow over a restricting layer in the top soil horizons, or a shallow water table which fluctuates within the soil profile, sometimes rising to or near the ground surface. In addition, water can move within confined man-made subsurface conveyance systems such as drain tiles and storm sewers, and in karst topography. Confined subsurface systems can move water, and potential contaminants, directly to surface waters and rapidly without the opportunity for nutrient or sediment reduction along the pathway.

Shallow subsurface connections move quickly through the soil and impact surface water directly within hours or days rather than the years it may take long pathways to reach surface waters. See Technical Support Document. Tools to assess shallow subsurface flow include reviewing the soils information from the NRCS Soil Survey, which is available for nearly every county in the United States. When assessing whether a water within the 4,000 foot boundary performs any of the functions identified in the rule's definition of significant nexus, the significant nexus determination can consider whether shallow subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters. However, neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves "waters of the United States."

The proposed rule did not set a distance threshold for case-specific waters to be evaluated for a significant nexus. Some commenters argued that there should be a limitation on areas subject to case-specific analysis while others contended that the agencies lack discretion to set regulatory limits that would exclude from jurisdiction *any* water meeting the significant nexus test. The agencies disagree that the agencies lack the authority to establish reasonable boundaries to determine what areas are subject to case-specific significant nexus analysis. Nothing in the CWA or case law mandates that the agencies require every water feature in the nation be subject to analysis for significant nexus. The Supreme Court has made clear that the agencies have the authority and responsibility to determine the limits of CWA jurisdiction, and establishing boundaries based on agency judgment, expertise and experience in

administering the statute is at the core of the agencies authority and discretion.

After weighing the scientific information about these waters' connectivity and importance to protecting downstream waters, the agencies' considerable experience making jurisdictional determinations, the objective of enhancing regulatory clarity and consistent with the statute and the caselaw, the agencies decided to set a boundary of 4,000 feet for case-specific significant nexus analysis for waters that do not otherwise meet the requirements of paragraphs (a)(1) through (a)(7). Tying this provision for case-specific significant nexus analysis to distance informed by the science, and the agencies' experience and expertise, as spatial proximity is a key contributor to connectivity among waters. Science Report at ES-11. Distance is by no means the sole factor, and aquatic functions will play a prominent role in determining whether specific waters covered under this aspect of paragraph (a)(8) have a significant nexus. In light of the role spatial proximity plays in connectivity and the objective of enhancing regulatory clarity, predictability and consistency, the agencies conclude that establishing a boundary for this aspect of waters subject to case-specific significant nexus analysis based on distance is reasonable.

While, for purposes of this national rule, distance is a reasonable and appropriate measure for identifying where this case-specific significant nexus analysis will be conducted, the science does not point to any particular bright line delineating waters that have a significant nexus from those that do not. The Science Report concluded that connectivity of streams and wetlands to downstream waters occurs along a gradient. The evidence unequivocally demonstrates that the stream channels and floodplain wetlands or open waters that together form river networks are clearly connected to downstream waters in ways that profoundly influence downstream water integrity. The connectivity and effects of non-floodplain wetlands and open waters are more variable and thus more difficult to address solely from evidence available in peer-reviewed studies. Science Report at ES-5. Because of this variability, with respect to waters that are not covered by paragraphs (a)(1) through (a)(7) of the rule, the science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters.

Like connectivity itself, there is also a continuum of outcomes associated with picking a distance threshold. A

smaller threshold increases the likelihood that waters that could have a significant nexus will not be analyzed and therefore not subject to the Act; a larger threshold reduces that possibility, but also means that agency and the public's resources are expended conducting significant nexus analyses on waters that have a lower likelihood of meriting the Act's protection.

Recognizing that there is no optimal line, in selecting both the 100-year floodplain for and the 4,000 foot boundaries the agencies looked principally to the extensive experience the Corps has gained in making significant nexus determinations since the *Rapanos* decision. As noted in Section III above, since the *Rapanos* decision, the agencies have developed extensive experience making significant nexus determinations, and that experience and expertise informed the judgment of the agencies in establishing both the 100-year floodplain boundary and the 4,000 foot boundary. The agencies have made determinations in every state in the country, for a wide range of waters in a wide range of conditions. The vast majority of the waters that the Corps has determined have a significant nexus are located within 4,000 feet of a jurisdictional tributary, traditional navigable or interstate water, or the territorial seas. Therefore, the agencies conclude that the 100-year floodplain and 4,000 foot boundaries in the rule will sufficiently capture for analysis those waters that are important to protect to achieve the goals of the Clean Water Act.

The agencies acknowledge that, as with any meaningful boundary, some waters that could be found jurisdictional lie beyond the boundary and will not be analyzed for significant nexus. The agencies minimize that risk by also establishing a provision in paragraph (a)(8) for case-specific significant nexus analysis of waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas. While in the agencies' experience the vast majority of wetlands with a significant nexus are located within the 4,000 foot boundary, it is the agencies' experience that there are a few waters that have been determined to be jurisdictional that are located beyond this boundary, typically due to a surface or shallow subsurface hydrologic connections. Nonetheless, the agencies have weighed these considerations and concluded that the value of enhancing regulatory clarity, predictability and consistency through a distance limit outweigh the likelihood that a distinct minority of waters that might be shown

to meet the significant nexus test will not be subject to analysis. In the agencies' experience, requiring an evaluation of significant nexus for waters covered by paragraph (a)(8) should capture the vast majority of waters having a significant nexus to the downstream waters. The agencies therefore conclude that that adoption of the 4,000 foot boundary is reasonable.

The rule's requirements for these waters, coupled with those for "adjacent waters," create an integrated approach that tailors the regulatory regime based on the science and the agencies' policy objectives. Determining by rule that covered adjacent waters have a significant nexus follows the science, achieves regulatory clarity and predictability, and avoids expenditure of agency and public resources on case-specific significant nexus analysis. Similarly, providing for case-specific significant nexus analysis for waters that are not adjacent but within the 4,000 foot distance limit, as well as those within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, is consistent with science and agency experience, will ensure protection of the important waters whose protection will advance the goals of the Clean Water Act, and will greatly enhance regulatory clarity for agency staff, regulated parties, and the public.

For these reasons, the agencies decided to allow case-specific determinations of significant nexus for waters located within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas and for waters located within 4,000 feet of the high tide line or the ordinary high water mark of a traditional navigable water, an interstate water, the territorial seas, an impoundment, or a covered tributary. Under the rule, these waters are jurisdictional only where they individually or cumulatively (if it is determined that there are other similarly situated waters) have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. Additional scientific and policy rationale for including such waters as waters that can be evaluated on a case-specific basis can be found in the Technical Support Document.

The agencies emphasize that they fully support efforts by States and tribes to protect under their own laws any additional waters, including locally special waters that may not be within the jurisdiction of the CWA as the agencies have interpreted its scope in this rule. Indeed, the promulgation of the 100-year floodplain and 4000 foot boundaries for purposes of a case-

specific analysis of significant nexus does not foreclose states from acting consistent with their state authorities to establish protection for waters that fall outside of the protection of the CWA. In promulgating the 4,000 foot boundary, the agencies have balanced protection and clarity, scientific uncertainties and regulatory experience, and established a line that is, in their judgment, reasonable and consistent with the statute and its goals and objectives.

3. Case-Specific Significant Nexus Determinations

Only waters identified in paragraphs (a)(7) or (a)(8) of the rule require a case-specific determination of significant nexus. This section discusses the definition of significant nexus in the rule and how the agencies will make case-specific significant nexus determinations under the rule.

a. Definition of Significant Nexus

Paragraph (c)(5) of the rule defines the term "significant nexus" to mean a significant effect (more than speculative or insubstantial) on the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas. Waters, including wetlands, are evaluated either alone, or in combination with other similarly situated waters in the region, based on the functions the evaluated waters perform. Functions to be considered for the purposes of determining significant nexus are sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering and transport, retention and attenuation of floodwaters, runoff storage, contribution of flow, export of organic matter, export of food resources, and provision of life-cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in traditional navigable waters, interstate waters, or the territorial seas.

The agencies' definition of significant nexus is based upon the language in *SWANCC* and *Rapanos*. The definition is also consistent with current practice, where field staff evaluate the functions of the waters in question and the effects of these functions on downstream waters. In order to add clarity and transparency to the definition of significant nexus, the agencies have listed in the definition the functions that will be considered in a significant nexus analysis. These functions are consistent with the agencies' scientific understanding of the functioning of aquatic ecosystems. A water does not need to perform all of the functions listed in paragraph (c)(5) in order to

have a significant nexus. Depending upon the particular water and the functions it provides, if a water, either alone or in combination with similarly situated waters, performs just one function, and that function has a significant impact on the integrity of a traditional navigable water, interstate water, or the territorial seas, that water would have a significant nexus.

Case-specific determinations of significant nexus require paragraph (a)(7) or (a)(8) waters to be evaluated either alone, or in combination with other similarly situated waters in the region. In the rule, the agencies interpret the phrase "in the region" to mean the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry. See Section III. In circumstances where the single point of entry watershed includes waters that are identified under paragraph (a)(7) and waters that are subject to analysis under paragraph (a)(8), those waters will be analyzed separately under the provisions of those paragraphs.

In a case-specific analysis of significant nexus, the agencies determine whether the water they are evaluating, in combination with other similarly situated waters in the region, has a significant effect on the chemical, physical, or biological integrity of the nearest traditional navigable water, interstate water, or the territorial seas. As noted previously, the agencies evaluate the listed functions in paragraph (c)(5) as part of that evaluation to determine if the water has an impact that is more than speculative or insubstantial.

b. Conducting Case-Specific Significant Nexus Determinations Under Paragraphs (a)(7) and (a)(8)

The significant nexus analysis for waters assessed under paragraphs (a)(7) and (a)(8) is a three-step process: First, the region for the significant nexus analysis must be identified—under the rule, it is the watershed which drains to the nearest traditional navigable water, interstate water or territorial sea; second, any similarly situated waters must be identified—under the rule, that is waters that function alike and are sufficiently close to function together in affecting downstream waters; and third, the waters are evaluated individually or in combination with any identified similarly situated waters in the single point of entry watershed to determine if they significantly impact the chemical, physical or biological integrity of the traditional navigable water, interstate water or the territorial seas.

i. "In the Region"—The Point of Entry Watershed

As discussed in Section III of the preamble and established in the definition of "significant nexus," the region for purposes of a significant nexus analysis is the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas. The first step of the analysis is to identify the point of entry watershed that the water being evaluated under paragraphs (a)(7) or (a)(8) drains to. This point of entry approach identifies the nearest traditional navigable water, interstate water, or the territorial seas that the water being evaluated and any similarly situated waters flow to and delineates the watershed of that nearest traditional navigable water, interstate water, or the territorial seas. The point of entry watershed is the area drained by the nearest traditional navigable water, interstate water, or the territorial seas and is typically defined by the topographic divides between one traditional navigable water, interstate water, or the territorial seas and another.

Available mapping tools, such as those that are based on the NHD, topographic maps, and elevation data, can be used to demarcate boundaries of the single point of entry watershed. As discussed in Section III and in the Technical Support Document, the single point of entry watershed represents the scientifically appropriate sized area for conducting a case-specific significant nexus evaluation in most cases.

In the arid West, the agencies recognize there may be situations where the single point of entry watershed is very large, and it may be reasonable to evaluate all similarly situated waters in a smaller watershed. Under those circumstances, the agencies may demarcate adjoining catchments surrounding the water to be evaluated that, together, are generally no smaller than a typical 10-digit hydrologic unit code (HUC-10) watershed in the same area. The area identified by this combination of catchments would be the "region" used for conducting a significant nexus evaluation under paragraphs (a)(7) or (a)(8) under those situations. The basis for such an approach in very large single point of entry watersheds in the arid West should be documented in the jurisdictional determination.

ii. "Similarly Situated"

Second, the agencies determine if the water or waters to be evaluated are similarly situated. The waters identified in paragraph (a)(7) are similarly situated

by rule and shall be combined with other waters of the same category located in the same watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas with no need for a case-specific similarly situated finding. Under paragraph (a)(7), only waters of the same subparagraph in the point of entry watershed can be considered as similarly situated. For example, only pocosins may be evaluated with other pocosins in the same point of entry watershed. Pocosins in different point of entry watersheds cannot be combined, and pocosins cannot be combined with Carolina bays under paragraph (a)(7), even where they occur in the same point of entry watershed.

Unlike waters evaluated under paragraph (a)(7), the waters specified at paragraph (a)(8) require a determination whether they are similarly situated. Under this step, the agencies apply factors in the determination of when waters evaluated under paragraph (a)(8) should be considered either individually or in combination for purposes of a significant nexus analysis. A determination of "similarly situated" requires an evaluation of whether a group of waters in the region that meet the distance thresholds set out under paragraph (a)(8) can reasonably be expected to function together in their effect on the chemical, physical, or biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas.

Similarly situated waters can be identified as sufficiently close together for purposes of this paragraph of the regulation when they are within a contiguous area of land with relatively homogeneous soils, vegetation, and landform (e.g., plain, mountain, valley, etc.). In general, it would be inappropriate, for example, to consider waters as "similarly situated" under paragraph (a)(8) if these waters are located in different landforms, have different elevation profiles, or have different soil and vegetation characteristics, unless the waters perform similar functions and are located sufficiently close to a "water of the United States" to allow them to consistently and collectively function together to affect a traditional navigable water, interstate water, or the territorial seas. In determining whether waters under paragraph (a)(8) are sufficiently close to each other the agencies will also consider hydrologic connectivity to each other or a jurisdictional water.

In determining whether groups of waters under paragraph (a)(8) perform "similar functions" the agencies will consider functions such as habitat,

water storage, sediment retention, and pollution sequestration. In addition, consideration of wetland/water type and landscape location are relevant for determining if the waters are similarly situated. For example, Texas coastal sand sheet wetlands that form a complex of wetlands with other wetlands of the same type on the landscape and are densely located may very well be similarly situated and considered in combination with other Texas coastal sand sheet wetlands in the same single point of entry watershed. However, under paragraph (a)(8), waters do not need to be of the same type (as they do in paragraph (a)(7)) to be considered similarly situated. As described above, waters are similarly situated under paragraph (a)(8) where they perform similar functions or are located sufficiently close to each other, regardless of type. The agencies will consider the hydrologic, geomorphic, and ecological characteristics and circumstances of the waters under consideration. Examples include: Documentation of chemical, physical, or biological interactions of the similarly situated waters; aerial photography; USGS and state and local topographical or terrain maps and information; NRCS soil survey maps and data; other available geographic information systems (GIS) data; National Wetlands Inventory maps where wetlands meet the CWA definition; and state and local information. The evaluation will use any available site information and pertinent field observations where available, relevant scientific studies or data, or other relevant jurisdictional determinations that have been completed in the region.

Only those waters that do not meet the requirements in paragraph (a)(1) through (a)(6) are to be considered in case-specific significant nexus determinations; subcategory waters that meet the provisions in paragraph (a)(1) through (a)(6) are *per se* jurisdictional without the need for a significant nexus determination. For example, waters that are identified under paragraph (a)(6) are adjacent and are not subject to a case-specific significant nexus evaluation under paragraph (a)(7) or (a)(8). Waters evaluated under paragraph (a)(7) cannot be combined with waters identified in paragraph (a)(6) or (a)(8), and waters evaluated under paragraph (a)(8) cannot be combined with waters identified in paragraph (a)(6) or (a)(7). For example, Prairie potholes being evaluated under paragraph (a)(7) may not be combined with Prairie potholes that are *per se* jurisdictional under paragraph (a)(6) that meet the definition

of adjacent. When a water meets the specifications at both paragraphs (a)(7) and (a)(8), it can only be evaluated under paragraph (a)(7). That is, for example, if a wetland is a Western vernal pool and is also within 4,000 feet of the ordinary high water mark of a covered tributary, it can only be assessed for significant nexus under paragraph (a)(7) in combination with other Western vernal pools in the point of entry watershed. Unlike paragraph (a)(8), there is no distance threshold for waters evaluated under paragraph (a)(7)—that is, waters in the paragraph (a)(7) subcategories that are more than 4,000 feet from the high tide line or the ordinary high water mark of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary or are beyond the 100-year floodplain of an traditional navigable water, interstate water, or the territorial seas are to be included in combination in a significant nexus analysis.

iii. Significant Nexus Analysis for Paragraph (a)(7) and (a)(8) Waters

Third, the agencies evaluate waters individually or in combination with any identified similarly situated waters in the single point of entry watershed to determine if they significantly impact the chemical, physical, or biological integrity of the traditional navigable water, interstate water, or the territorial seas. For purposes of determining significant nexus under paragraph (a)(7), all waters of the specified subcategory are to be considered in combination in the point of entry watershed, as those waters are similarly situated. For purposes of determining significant nexus under paragraph (a)(8), depending on the results of step two, a water within the boundaries in paragraph (a)(8) is evaluated either alone or in combination with other similarly situated waters in the region. For example, in the case where the agencies have determined that a particular water under paragraph (a)(8) is not similarly situated, it is evaluated individually for significant nexus; the water cannot be aggregated if it is not similarly situated with other such waters.

The analysis will include an evaluation of the functions listed in paragraph (c)(5) of the rule, which defines significant nexus. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest traditional

navigable water, interstate water, or the territorial seas. A water may be determined to have a significant nexus based on performing any of the following functions: sediment trapping, nutrient recycling, pollutant trapping, transformation, filtering, and transport, retention and attenuation of floodwaters, runoff storage, contribution of flow, export of organic matter, export of food resources, or provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a traditional navigable water, interstate water, or the territorial seas.

For purposes of paragraph (c)(5)(ix), a species is located in a traditional navigable water, interstate water, or the territorial seas if such a water is a typical type of habitat for at least part of the life cycle of the species. For example, amphibians and many reptiles can use a traditional navigable water, interstate water, or the territorial seas for part of their life cycle needs.

When evaluating a water individually or in combination with other similarly situated waters for the presence of a significant nexus to a traditional navigable water, interstate water, or the territorial seas, a variety of factors will influence the chemical, physical, or biological connections the water has with the downstream traditional navigable water, interstate water, or the territorial seas, including distance from a jurisdictional water, the presence of surface or shallow subsurface hydrologic connections, and density of waters of the same type (if it has been concluded that such waters can be evaluated in combination). The likelihood of a significant connection is greater with increasing size and decreasing distance from the identified traditional navigable water, interstate water, or the territorial seas, as well as with increased density of the waters for such waters that can be considered in combination as similarly situated waters. In addition, the presence of a surface or shallow subsurface hydrologic connection can influence the impact that a water has with downstream waters.

In many cases, the presence of a hydrologic connection increases the strength of the impact of the downstream traditional navigable water, interstate water, or the territorial seas. However, a hydrologic connection is not necessary to establish a significant nexus, because, as Justice Kennedy stated, in some cases the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water,

interstate water, or the territorial seas. These functional relationships include retention of floodwaters or pollutants that would otherwise flow downstream to the traditional navigable water, interstate water, or the territorial seas. See 547 U.S. at 775 (citations omitted) (J. Kennedy) (“it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme”). The Science Report concludes, “[s]ome effects of non-floodplain wetlands on downstream waters are due to their isolation, rather than their connectivity. Wetland ‘sink’ functions that trap materials and prevent their export to downstream waters (e.g., sediment and entrained pollutant removal, water storage) result because of the wetland’s ability to isolate material fluxes.” Science Report at ES-4. For example, a report that reviewed the results of multiple scientific studies concluded that depressional wetlands lacking a surface outlet functioned together to significantly reduce or attenuate flooding. See Science Report and Technical Support Document. Even when they lack a surface hydrologic connection to downstream traditional navigable waters, interstate waters, or the territorial seas, Prairie potholes, for instance, cumulatively can store large volumes of water, impacting streamflow and reducing flooding downstream, and several studies have quantified the large storage capacity of Prairie pothole complexes. This water storage function is estimated to hold tens of millions of cubic meters of water, including for example Prairie potholes located in the watersheds of Devils Lake and the Red River of the North, which have both had a long history of flooding. Where Prairie potholes lack a surface hydrologic connection, this water storage capacity is particularly effective in reducing downstream flooding and can have a significant effect on downstream traditional navigable waters, interstate waters, or the territorial seas. Thus, even when lacking a surface hydrologic connection, a water can still have a significant effect on the chemical or the biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas.

The rule recognizes that not all waters have the requisite connection to traditional navigable waters, interstate waters, or the territorial seas sufficient to be determined jurisdictional. Waters with a significant nexus must significantly affect the chemical, physical, or biological integrity of a downstream traditional navigable water,

interstate water, or the territorial seas, and the requisite nexus must be more than "speculative or insubstantial." *Rapanos* at 780.

Evidence of chemical connectivity and the effect on waters can be found by identifying the properties of the water in comparison to the identified traditional navigable water, interstate water, or the territorial seas; signs of retention, release, or transformation of nutrients or pollutants; and the effect of landscape position on the strength of the connection to the nearest "water of the United States," and through it to a traditional navigable water, interstate water, or the territorial seas. In addition, relevant factors influencing chemical connectivity include hydrologic connectivity (see physical factors, below), surrounding land use and land cover, the landscape setting, and deposition of chemical constituents (e.g., acidic deposition).

Evidence of physical connectivity and the effect on traditional navigable waters, interstate waters, or the territorial seas can be found by identifying evidence of physical connections, such as flood water or sediment retention (flood prevention). Presence of indicators of hydrologic connections between the other water and jurisdictional water are also indicators of a physical connection. Factors influencing physical connectivity include rain intensity, duration of rain events or wet season, soil permeability, and distance of hydrologic connection between the paragraph (a)(7) or (a)(8) water and the traditional navigable water, interstate water, or the territorial seas, depth from surface to water table, and any preferential flowpaths.

Evidence of biological connectivity and the effect on waters can be found by identifying: Resident aquatic or semi-aquatic species present in the case-specific water and the tributary system (e.g., amphibians, aquatic and semi-aquatic reptiles, aquatic birds); whether those species show life-cycle dependency on the identified aquatic resources (foraging, feeding, nesting, breeding, spawning, use as a nursery area, etc.); and whether there is reason to expect presence or dispersal around the case-specific water, and if so whether such dispersal extends to the tributary system or beyond or from the tributary system to the case-specific water. Factors influencing biological connectivity include species' life history traits, species' behavioral traits, dispersal range, population size, timing of dispersal, distance between the case-specific water and a traditional navigable water, interstate water, or the

territorial seas, the presence of habitat corridors or barriers, and the number, area, and spatial distribution of habitats. Non-aquatic species or species such as non-resident migratory birds do not demonstrate a life cycle dependency on the identified aquatic resources and are not evidence of biological connectivity for purposes of this rule.

For practical administrative purposes, the rule does not require evaluation of all similarly situated waters under paragraph (a)(7) or (a)(8) when concluding that those waters have a significant nexus to a traditional navigable water, interstate water, or territorial sea. When a subset of similarly situated waters provides a sufficient science-based justification to conclude presence of a significant nexus, for efficiency purposes a significant nexus analysis need not unnecessarily require time and resources to locate and analyze all similarly situated waters in the entire point of entry watershed. For example, if a single Carolina bay or a group of Carolina bays in a portion of the point of entry watershed is determined to significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas, the analysis does not have to document all of the similarly situated Carolina bays in the watershed in order to conduct the significant nexus analysis. A conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water.

While the rule is clear that waters that are jurisdictional by rule cannot be combined with waters subject to a case-specific significant nexus analysis, the analysis may appropriately include the evaluation of functions of paragraph (a)(8) waters that reach covered waters through paragraph (a)(6) waters without consideration of the functions contributed by those paragraph (a)(6) waters. The hydrologic connections between paragraph (a)(8) waters and a covered tributary and eventually to a traditional navigable water, interstate water, or the territorial seas, can often occur through an adjacent water. This hydrologic connection is an appropriate part of the case-specific analysis as to whether the paragraph (a)(8) waters, alone or in combination with any similarly situated paragraph (a)(8) waters in the point of entry watershed, provide those functions downstream such that they significantly affect the chemical, physical or biological

integrity of the traditional navigable water, interstate water, or the territorial seas. For example, when evaluating a wetland that is 2,500 feet from the ordinary high water mark of an paragraph (a)(5) water and that has surface or shallow subsurface connections to downstream traditional navigable waters, interstate waters, or the territorial seas via a wetland that is adjacent to an paragraph (a)(4) water, the existence of those connections is not ignored. However, while a water's connections to the traditional navigable water, interstate water, or the territorial seas through paragraph (a)(5) through (a)(7) waters can be considered in the significant nexus analysis in order to determine whether the functions of the paragraph (a)(8) waters are provided downstream, only the functions of the water, along with any similarly situated waters, being evaluated under paragraph (a)(8) on downstream water integrity can be included in the significant nexus analysis.

The administrative record for a jurisdictional determination for a water under paragraph (a)(7) or (a)(8) will include available information supporting the determination. In addition to location and other descriptive information regarding the water at issue, the record will include an explanation of the rationale for the jurisdictional conclusion and a description of the information used. Relevant information can come from many sources, and need not always be specific to the water whose jurisdictional status is being evaluated. Studies of the same type of water or similarly situated waters can help to inform a significant nexus analysis as long as they are applicable to the water being evaluated. In the case of paragraph (a)(8) waters, the administrative record will include the rationale behind the similarly situated analysis, including an explanation of the data or information examined.

The agencies expect that where waters are determined to be similarly situated in a single point of entry watershed, such similarly situated waters will often be found jurisdictional through the case-specific analysis of significant nexus. However, case-specific factors such as distance to the traditional navigable water, interstate water, or the territorial seas; density or number of similarly situated waters; individual and cumulative size of the similarly situated waters; soil permeability; climate; etc., may be considered in the determination, and there could be cases where even considering these waters in combination with similarly situated waters will not

be sufficient for waters to have a significant nexus.

Within a single point of entry watershed, over a period of time there will likely be multiple jurisdictional determinations. For paragraph (a)(7) waters, if a case-specific significant nexus determination has been made in the point of entry watershed, all waters in the subcategory in the point of entry watershed are jurisdictional. For paragraph (a)(8) waters, the case-specific significant nexus analyses must use information used in previous jurisdictional determinations, and if a significant nexus has been established for one water in the watershed, then other similarly situated waters in the watershed would also be found to have a significant nexus. This is because under Justice Kennedy's test, similarly situated waters in the region should be evaluated together. A positive significant nexus determination would then apply to all similarly situated waters within the point of the watershed. A negative case-specific significant nexus evaluation under paragraph (a)(7) or (a)(8) of all similarly situated waters in the point of entry watershed applies to all similarly situated waters in that watershed. However, as noted above, a conclusion that significant nexus is lacking may not be based on consideration of a subset of similarly situated waters, because under the significant nexus standard the inquiry is how the similarly situated waters in combination affect the integrity of the downstream water. The documentation for each case should be complete enough to support the specific jurisdictional determination, including an explanation of which waters were considered together as similarly situated and in the same region.

4. Summary of Revisions to Case-Specific Determinations of "Waters of the United States" and Major Comments

a. Significant Nexus

Some commenters stated concerns over the potential for inconsistent application of the significant nexus analysis in a jurisdictional determination. To address this concern within the regulatory framework, the agencies provide more detail regarding the definition of significant nexus in the rule and list the specific functions that will be considered in the analysis. This approach provides individual regulators who conduct the analysis clear and consistent parameters that they will consider during their review in making jurisdictional determinations and provides transparency to the regulated

public over which factors will be considered.

Overall, there was support for the concept of the single point of entry watershed as the interpretation of "in the region." Several commenters supported the approach that the single point of entry watershed was an appropriate scale to use to measure effect on traditional navigable waters, interstate waters, or the territorial seas. Other commenters felt the single point of entry watershed was too small to capture all the benefits that waters that do not meet the definition of adjacency contribute. Some of the SAB panel members thought that because surface and ground-watershed units may not align, watersheds might be problematic for defining "in the region." These panel members suggested that a more scientifically justified approach would include surface and subsurface waters in a watershed delineation. The agencies have retained the single point of entry watershed from the proposed rule as the appropriate unit of analysis for significant nexus in the final rule as these watersheds are more easily understood and easier to delineate than those that map subsurface waters as the SAB suggested.

With respect to the agencies' approach to "similarly situated waters," commenters offered support for assessing waters in combination based on their type and function, particularly waters such as Prairie potholes. Conversely, several commenters found that the ability to aggregate waters that do not meet the definition of adjacency is over-reaching and causes uncertainty to the regulated public. Some commenters also attributed uncertainty in which waters were regulated to subjectivity in review by Federal regulator(s). Similarly, some commenters were concerned that waters eligible for protection were based on an individual analyst's interpretation and wanted to know how the agencies would address consistency and potential bias. In response, the rule lists in paragraph (a)(7) a limited number of subcategories of waters where waters of the specified types have been determined by rule to be similarly situated for a significant nexus analysis. This will add consistency, predictability, and clarity, as the rule explicitly states that such waters are similarly situated for purposes of the significant nexus analysis. For waters identified under paragraph (a)(8), the agencies have established two limitations: Waters within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, and waters within 4,000 foot feet

of a traditional navigable water, interstate water, the territorial seas, impoundment, or covered tributary. The agencies also have established within the definition of significant nexus at paragraph (c)(5) criteria for determining whether waters are similarly situated and should therefore be analyzed in combination. Waters identified under paragraph (a)(8) are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. The agencies have not determined that such waters are categorically similarly situated, so the agencies will base their case-specific determinations of whether a particular water has any similarly situated waters on the available information and science. The rule also clarifies that paragraph (a)(8) waters cannot be considered similarly situated with "adjacent waters," which are jurisdictional by rule, and paragraph (a)(7) waters, which have been determined to be similarly situated by rule. These parameters will reduce inconsistency in reviews and add clarity.

Similarly, several commenters expressed concern that landowners would not know which water bodies on their property are subject to CWA jurisdiction due to aggregation, as waters on their property may be considered similarly situated with waters located off-site. While the rule does not eliminate the use of case-specific significant nexus analyses, and the concern arises from Justice Kennedy's phrase "similarly situated," the parameters placed on waters requiring a case-specific determination and the clearer definition of significant nexus address the concerns about uncertainty and inconsistencies in reviews. In particular, waters that are not either one of the five identified subcategories in paragraph (a)(7) or within the thresholds in paragraph (a)(8) cannot be subject to a case-specific significant nexus analysis under the rule. Generally, jurisdictional determinations are conducted at the request of an applicant or landowner for specific waters. While the agencies cannot arbitrarily depart from a determination that waters are "similarly situated," landowners may provide new information to inform subsequent jurisdictional determinations. In addition, owners with questions regarding jurisdiction of waters on their property may always consult their local Corps District or EPA Regional Office, which is not a change from longstanding practice.

b. Case-Specific Determinations

The rule provides more regulatory certainty by narrowing the scope of waters that can be assessed under a case-specific significant nexus evaluation as compared to the proposal. These changes still allow the scientific value of specific waters not covered in paragraph (a)(1) through (a)(6) to be evaluated on a case-specific basis.

In the proposal, the agencies solicited comment regarding a variety of approaches to the category of waters subject to a case-specific significant nexus analysis. In addition, the agencies solicited comment on additional scientific research and data that might further inform decisions about these waters. In particular the agencies solicited information about whether current scientific research and data regarding particular types of waters are sufficient to support the inclusion of subcategories of types of waters, either alone or in combination with similarly situated waters, that can appropriately be identified as always lacking or always having a significant nexus. One of these alternate approaches in the preamble to the proposed rule was to determine by rule that certain additional subcategories of waters would be jurisdictional rather than addressed with a case-specific basis for determining significant nexus.

Many commenters expressed support for the agencies' proposed approach to case-specific waters, included additional references to support these waters being protected by rule, and supported the treatment of certain categories of waters as similarly situated (that is, evaluating them in combination with similarly situated waters for the purposes of the significant nexus analysis). Some suggested the agencies establish jurisdiction over case-specific waters by rule and provided detailed information in support of their position. Other commenters suggested additional subcategories of waters be considered as jurisdictional or as similarly situated by rule, such as playa lakes, kettle lakes, and woodland vernal pools.

However, there was a concern raised by other commenters about what was termed regulatory overreach and uncertainty created by the "other waters" category in the proposal. Some commenters stated that the "other waters" category in the proposal would allow the agencies to regulate virtually any water. To address this concern, the rule places limits on which waters could be subject to a case-specific significant nexus determination, in recognition that case-specific analysis of significant nexus is resource-intensive

and based on the body of science that exists. As noted above, the agencies also establish by rule subcategories of waters that are "similarly situated" for the purposes of a significant nexus analysis because science supports that the subcategory waters fall within a higher gradient of connectivity. By not determining that any one of the waters available for case-specific analysis is jurisdictional by rule, the agencies are recognizing the gradient of connectivity that exists and will assert jurisdiction only when that connection and the downstream effects are significant and more than speculative and insubstantial.

Waters are covered under the rule only where they are identified as jurisdictional in paragraphs (a)(1) through (a)(6), where they are not excluded under paragraph (b), or where they are within the limited number of subcategories listed in paragraphs (a)(7) and (a)(8) and have a case-specific significant nexus to a traditional navigable water, interstate water, or the territorial seas. These limits on jurisdiction reflect the case law and are in response to comments requesting greater regulatory certainty. Although some commenters suggested additional subcategories of waters for consideration, such as playa lakes and kettle lakes, the agencies at this time are not able to determine that the available science supports that the suggested additional subcategories of waters as a class have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. However, to be clear, under the rule, individual waters of the suggested additional subcategories are jurisdictional where they meet the requirements of paragraphs (a)(1) through (a)(6) or (a)(8) (e.g., a playa lake that is an interstate water, a kettle lake that is an adjacent water, or a woodland vernal pool that is less than 4,000 feet from a jurisdictional tributary and is determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas).

In consideration of the variety of views of the commenters, the Science Report, the input from the SAB, and the developing state of the science, the agencies reasonably decided not to establish jurisdiction over all waters that do not meet the requirements of paragraph (a)(1) through (a)(6) by rule. Instead, the agencies established case-specific provisions for some specified waters at paragraph (a)(7) and waters within the boundaries at paragraph (a)(8). This approach strikes a balance between requests for clear boundaries and limited case-specific reviews with scientific support.

I. Waters and Features That Are Not "Waters of the United States"

In the rule, the agencies identify a variety of waters and features that are not "waters of the United States." Prior converted cropland and waste treatment systems have been excluded from this definition since 1992 and 1979, respectively, and they remain substantively and operationally unchanged. Only ministerial changes to delete an outdated cross reference are made to the exclusion for waste treatment systems. The agencies add exclusions for all waters and features identified as generally exempt in preamble language from **Federal Register** documents by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. In addition, under prior preamble language, the agencies retained the authority to determine that a particular feature generally considered non-jurisdictional was in fact a "water of the United States." The agencies do not retain that authority for features excluded under the rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent. These exclusions are reflective of current agencies' practice, and their inclusion in the rule furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA. Importantly, under the rule all waters and features identified in paragraph (b) as excluded will not be "waters of the United States," even if they otherwise fall within one of the categories in paragraphs (a)(4) through (a)(8). For example, a ditch that is excluded under paragraph (b)(3)(i) or (b)(3)(ii) is not jurisdictional even when the ditch connects directly or through another water to a traditional navigable water, interstate water, or the territorial seas. The proposed rule referenced paragraphs (a)(1) through (a)(8), but the agencies did not intend to exclude any traditional navigable waters, for example, and the revision clarifies that. Finally, nothing in the rule is intended to change the way in which the Corps applies individual or nationwide permits.

The exclusions reflect the agencies' long-standing practice and technical judgment that certain waters and

features are not subject to the CWA. The exclusions are also guided by Supreme Court cases. The significant nexus standard arises from the case law and is used to interpret the terms of the CWA. Thus, a significant nexus determination is not a purely scientific inquiry, but rather is a determination by the agencies in light of the statutory language, the statute's goals, objectives and policies, the case law, the relevant science, and the agencies' technical expertise and experience. The plurality opinion in *Rapanos* also noted that there were certain features that were not primarily the focus of the CWA. See 547 U.S. at 734. In this section of the proposed rule, the agencies are drawing lines and concluding that certain waters and features are not subject to the jurisdiction of the Clean Water Act. The Supreme Court has recognized that clarifying the lines of jurisdiction is a difficult task: "Our common experience tells us that this is often no easy task: The transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious." *Riverside Bayview* at 132–33. The exclusions are an important aspect of the agencies' policy goal of providing clarity and certainty. Just as the categorical assertions of jurisdiction over covered tributaries and covered adjacent waters simplify the jurisdiction issue, the categorical exclusions will likewise simplify the process, and they reflect the agencies' determinations of the lines of jurisdiction based on science, the case law and the agencies' experience and expertise.

The existing exclusion for waste treatment systems moves to paragraph (b)(1) with no substantive changes. One ministerial change is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists. Because the agencies are not addressing the substance of the exclusion, the agencies do not make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion, with the exception of deleting the cross-reference.

Many commenters expressed concern about whether the agencies' insertion of a comma following this ministerial change unintentionally narrowed the

exclusion such that all excluded waste treatment systems must be designed to meet the requirements of the Clean Water Act. The commenters indicated concerns that waste treatment systems built before the Clean Water Act or primarily for purposes of other environmental laws could not be exempt. The agencies do not intend to change how the waste treatment exclusion is implemented and have deleted this proposed comma. Continuing current practice, any waste treatment system built in a "water of the United States" would need a section 404 permit to be constructed and a section 402 permit for discharges from the waste treatment system into "waters of United States."

A number of commenters suggested the agencies clarify how the waste treatment system exclusion is currently implemented. Many comments raised questions about stormwater systems and wastewater reuse and whether such facilities qualified under the waste treatment system exclusion as part of a complete waste treatment system. For clarity, the agencies have identified related exclusions in paragraphs (b)(6) and (b)(7). Many commenters also suggested making substantive changes to the existing exclusion for waste treatment systems. Because the agencies are not making any substantive changes to the waste treatment system exclusion and these comments are outside the scope of the proposed rule, the final rule does not reflect changes suggested in public comments.

The existing exclusion for prior converted cropland moves to paragraph (b)(2) of the rule and is unchanged. A number of commenters suggested changes to the existing exclusion for prior converted cropland. As with waste treatment systems, the preamble to the proposed rule stated this rulemaking was not making changes to the exclusion for prior converted cropland. As a result, comments requesting changes to the prior converted cropland exclusion or seeking clarification of how the exclusion is implemented in the field are outside the scope of this rulemaking, and the rule does not reflect changes or respond to issues raised in public comments. The agencies will continue to implement this exclusion consistent with current policy and practice.

The agencies identify excluded ditches in paragraph (b)(3). Jurisdictional ditches are discussed at more detail in section IV.F. The rule excludes all ditches with ephemeral flow that are not excavated in or relocate a tributary. The rule also excludes ditches with intermittent flow

that are not a relocated tributary, excavated in a tributary, or drain wetlands, regardless of whether or not the wetland is a jurisdictional water. Finally, ditches that do not connect to a traditional navigable water, interstate water, or territorial sea either directly or through another water are excluded, regardless of whether the flow is ephemeral, intermittent, or perennial. These ditch exclusions are clearer for the regulated public to identify and more straightforward for agency staff to implement than the proposed rule or current policies. The ditch exclusions do not affect the possible status of a ditch as a point source.

Many comments addressed ditches, and many of these comments are reflected in the approach to ditches articulated in the rule. The majority of commenters requested that the agencies' ditch exclusion be clarified or broadened. Many commenters were confused by the term "uplands" and did not feel the term had a common understanding. For example, some commenters felt the term referred only to areas at higher elevations in the landscape. Many expressed concerns that all ditches would be jurisdictional under the proposed rule. Many groups especially called for exclusions of roadside ditches.

The revised exclusions reflect the agencies' careful consideration of these comments. First, the agencies have eliminated the term "uplands" in response to the questions the term created. Second, the agencies have instead provided a clearer statement of the types of ditches that are subject to exclusion—ditches that are not excavated in or relocate a tributary and ditches that do not drain a wetland. Eliminating the term "uplands" with this more straightforward description should improve clarity. Finally, the agencies have more clearly stated the flow regimes in ditches that are subject to the exclusions; these flow regimes are described earlier and have been used by the agencies consistently and are readily understood by field staff and the public.

As noted, the agencies received many comments asking that roadside ditches be addressed, and more specifically excluded, in the final rule. Like the proposed rule, the final rule does not include an explicit exclusion for roadside ditches, but the agencies believe the exclusions included in the final rule will address the vast majority of roadside and other transportation ditches. Moreover, since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have

concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with modes of transportation, such as roadways, airports, and rail lines.

As discussed in Section IV.F.1., the definition of tributary includes natural, undisturbed waters and those that have been man-altered or constructed, but which science shows function as a tributary. In addition, natural streams and rivers that are altered or modified for purposes as flood control, erosion control, and other reasons does not convert the tributary to a ditch. A stream or river that has been channelized or straightened because its natural sinuosity has been altered, cutting off the meanders, is not a ditch. A stream that has banks stabilized through use of concrete or rip-rap (*e.g.*, rocks or stones) is not a ditch. The Los Angeles River, for example, is a “water of the United States” (and, indeed, a traditional navigable water) and remains a “water of the United States” and is not a ditch excluded under paragraph (b)(3), even where it has been ditched, channelized, or concreted.

The rule excludes ditches with ephemeral flow except where a ditch is excavated in or relocates a covered tributary. Under the rule, that portion of a ditch with ephemeral flow actually excavated in or relocating the covered tributary would be considered jurisdictional. The jurisdictional status of upstream and downstream portions of the same ditch would have to be assessed based on the specific facts and under the terms of the rule to determine flow characteristics and whether or not the ditch is excavated in or relocates a tributary. This approach reasonably balances the exclusion with the need to ensure that covered tributaries, and the significant functions they provide, are preserved. A ditch that relocates a stream is not an excluded ditch under paragraph (b)(3), and a stream is relocated either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected. A ditch that is a relocated stream is distinguishable from a ditch that withdraws water from a stream without changing the stream’s aquatic character. The latter type of ditch is excluded from jurisdiction where it meets the listed characteristics of excluded ditches under paragraph (b)(3). The agencies will determine historical presence of tributaries using a variety of resources, such as USGS and state and local maps, historic aerial photographs, local surface water management plans, street maintenance data, wetlands and

conservation programs and plans, as well as functional assessments and monitoring efforts.

The rule also excludes ditches with intermittent flow except where a ditch is excavated in or relocates a covered tributary, or drains wetlands. Where an excluded ditch drains a wetland, the segment of the ditch that physically intersects the wetland would be considered jurisdictional. The jurisdictional status of upstream and downstream portions of the same ditch would have to be assessed based on the specific facts and under the terms of the rule to determine flow characteristics and whether or not the ditch drains a wetland. The provision of paragraph (b)(3) addressing draining of wetlands is specific to ditches with intermittent flow. As discussed previously, features that are ephemeral will flow only in response to precipitation events, such as rainfall or snowmelt. Ditches with ephemeral flow, therefore, do not typically have the flow characteristics characteristic of ditches that drain wetlands. The agencies have accordingly focused on intermittent ditches that drain wetlands.

In addition, the agencies clarify that a ditch drains a wetland when it physically intersects the wetland. If the ditch has been cut to carry only ephemeral flows, such as those following a storm event, the effect of the ditch is minimal as it carries only that flow that overtops the wetland during and immediately following the rain event. However, if the ditch has been cut to carry intermittent or perennial flows from the wetland, the ditch is serving as a conduit for transferring flow from the wetland to a downstream tributary. As a result of the cut ditch, the wetland’s hydrologic regime is modified and can generally affect the natural functions performed by the wetland. When the ditch has been cut to carry intermittent or perennial flow from the wetland to the downstream tributary, the wetland soils and vegetation can shift into a community that supports less hydric soils and a mix of riparian or upland vegetation. Consequently, the ditch is draining the wetland and the wetland quality degrades and may cease to exist over time. Therefore, a ditch that carries intermittent flow and physically intersects with a wetland is not excluded under this provision.

A number of commenters expressed concern that a ditch could be viewed as both a point source and a “water of the United States.” However, the approach that ditches can be considered both reflects the CWA itself as well as longstanding agency policy.

Paragraph (b)(4) of the rule identifies features and waters that the agencies have identified as generally not “waters of the United States” in previous preambles or guidance documents. Codifying these longstanding practices supports the agencies’ goals of providing greater clarity, certainty, and predictability for the regulated public and the regulators. The agencies’ 1986 and 1988 preambles indicated that these waters could be determined on a case-specific basis to be “waters of the United States.” This rule does not allow for this case-specific analysis to be used to establish jurisdiction—these waters are categorically excluded from jurisdiction. Some of the exclusions have been modified slightly to address public comments and improve clarity. The following features are not “waters of the United States”:

- Artificially irrigated areas that would revert to dry land should application of irrigation water to that area cease
- Artificial, constructed lakes or ponds created by excavating and/or diking dry land such as farm and stock watering ponds, irrigation ponds, settling basins, log cleaning ponds, cooling ponds, or fields flooded for rice growing
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand or gravel that fill with water
- Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways
- Puddles

Several of these exclusions use the phrase “dry land.” This phrase appears in the 1986 and 1988 preambles, and the agencies believe the term is well understood based on the more than 30 years of practice and implementation. But in keeping with the goal of providing greater clarity, the agencies state that “dry land” refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds and the like. However, it is important to note that a “water of the United States” is not considered “dry land” just because it lacks water at a given time. Similarly, an area remains “dry land” even if it is wet after a rainfall event. The agencies received comments suggesting that the

final rule provide a definition of “dry land” as it relates to the exclusion for stormwater control features. The agencies considered the request and determined that there was no agreed upon definition given geographic and regional variability. The agencies concluded that further clarity on this issue can be provided during implementation.

In the exclusion for artificial lakes or ponds, the agencies have removed language regarding “use” of the ponds, including the term “exclusively.” In most cases, the “use” of the pond is captured in its name. More importantly, the agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. For example, rice growing is typically facilitated by land leveling and inundation that floods vast areas. The fields are flooded for the purpose of weed control and to facilitate rice cultivation, but these rice fields are often extensively used by waterfowl and other wildlife. The agencies agree with commenters who raised concern that rice fields “used” both for rice growing and waterfowl habitat should continue to be excluded even where they are not used “exclusively” for a single purpose. The change to the exclusion reflects the agencies’ practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use.

The agencies have also added farm ponds, log cleaning ponds, and cooling ponds to the list of excluded ponds in the rule based on public comments. The list of ponds has always been illustrative rather than exhaustive, and the additions respond to requests to clarify that farm ponds, and log cleaning ponds¹² created in dry land are excluded. The agencies have also added cooling ponds created in dry land to the list of excluded waters. The agencies also note that cooling ponds that are created under section 404 in jurisdictional waters and that have NPDES permits are subject to the waste treatment system exclusion, which is not changing. Cooling ponds created to serve as part of a cooling water system with a valid state permit constructed in waters of the United States prior to enactment of the Clean Water Act and currently excluded from jurisdiction remain excluded under the new rule. Additional ponds will also likely fall under the exclusion based on site

specific evaluation, including, for example, fire control ponds and fishing ponds excavated from dry land. Artificial lakes and ponds created in dry land that do not connect to jurisdictional waters are covered by this exclusion. Where these ponds do connect and discharge to jurisdictional waters, the agencies will evaluate factors such as the potential for introduction of pollutants and coverage under an issued NPDES permit. As a general matter, ponds created in dry land that discharge to “waters of the United States” are covered by the exclusion where such discharge is regulated under a NPDES permit. Conveyances created in dry land that are physically connected to and are a part of the excluded feature are also excluded. These artificial features are working together as a system, and it is appropriate to treat them as one functional unit. The agencies emphasize that ponds excluded from “waters of the United States” can, in some circumstances, be point sources of pollution subject to section 301 of the Act.

The rule includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies’ 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity.

The agencies also here clarify their longstanding view that only the specific land being directly irrigated that would revert to dry land should irrigation cease is exempt; it is not the case that all waters within watersheds where irrigation occurs are exempt.

The rule identifies all erosional features, including gullies and rills, as non-jurisdictional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Erosional features are not jurisdictional under the terms of paragraph (a) and the definitions in paragraph (c), especially the definition of tributary. These features are specifically excluded in the rule to avoid confusion, because preceding guidance identified them as non-jurisdictional and many commenters stated these exclusions were important to maintain in the rule.

Tributaries can be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark. Concentrated surface runoff can occur within erosional features without creating the permanent physical characteristics associated with bed and banks and ordinary high water mark. See Technical Support Document. It should be noted that some ephemeral streams are colloquially called “gullies” or the like even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features.

The rule also excludes lawfully constructed grassed waterways. Grassed waterways are lawfully constructed for purposes of this rule either where they are on dry land and replace non-jurisdictional erosional features or, more commonly, where they have been lawfully converted from an intermittent or ephemeral stream under a CWA permit. Once converted to grassed waterways, these former streams segments no longer exhibit a bed and banks or ordinary high water mark and are excluded because they do not meet the definition of “tributary.” However, such conversion does not sever jurisdiction over the entire length of the tributary above and below the grassed waterway. Instead, the grassed waterway is considered a constructed break in the bed and banks and ordinary high water mark. This is reflected in the definition of tributary, which specifically addresses natural or man-made breaks in bed and banks and ordinary high water mark.

The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the agencies have never considered puddles to meet the minimum standard for being a “water of the United States,” and it is an inexact term. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.

The agencies include an exclusion for groundwater, including groundwater drained through subsurface drainage systems. As discussed in the preamble to the proposed rule, the agencies have never interpreted “waters of the United States” to include groundwater. The exclusion does not apply to surface expressions of groundwater, as some commenters requested, such as where groundwater emerges on the surface and

¹² Log cleaning ponds are used to float logs for removal of twigs, branches, and large knots.

becomes baseflow in streams or spring fed ponds.

The final rule includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. The agencies stated in the proposed rule that the exclusions were guided by decisions of the Supreme Court and were intended to further the agencies' goal of providing clarity and certainty. The agencies in the proposed rule sought to provide a "full description" of the waters that will not be "waters of the United States." 79 FR at 22218. In response to the agencies' proposal, several commenters indicated additional clarity was needed, particularly with respect to stormwater control features and wastewater recycling facilities. This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems, and also to address confusion about the state of practice regarding jurisdiction of these features at the time the rule was proposed.

The agencies' longstanding practice is to view stormwater control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice. Nonetheless, the agencies recognize that the proposed rule brought to light confusion about which stormwater control features are jurisdictional waters and which are not, and agree that it is appropriate to address this confusion by creating a specific exclusion in the final rule for stormwater controls features that are created in dry land.

Many commenters, particularly municipalities and other public entities that operate storm sewer systems and stormwater management programs, expressed concern that various stormwater control measures—such as stormwater treatment systems, rain gardens, low impact development/green infrastructure, and flood control systems—could be considered "waters of the United States" under the proposed rule, either as part of a tributary system, an adjacent water, or as a result of a case-specific significant nexus analysis. This exclusion should clarify the appropriate limits of jurisdiction relating to these systems. A key element of the exclusion is whether the feature or control system was built in dry land and whether it conveys,

treats, or stores stormwater. Certain features, such as curbs and gutters, may be features of stormwater collection systems, but have never been considered "waters of the United States."

Stormwater control features have evolved considerably over the past several years, and their nomenclature is not consistent, so in order to avoid unintentionally limiting the exclusion, the agencies have not included a list of excluded features in the rule. The rule is intended to exclude the diverse range of control features that are currently in place and may be developed in the future.

Traditionally, stormwater controls were designed to direct runoff away from people and property as quickly as possible. Cities built systems to collect, convey, or store stormwater, using structures such as curbs, gutters, and sewers. Often, cities used existing stream networks as part of the stormwater drainage network. Retention and detention stormwater ponds were built to store excess stormwater until it could be more safely released.

Recently, treatment of stormwater has become more prevalent to remove harmful pollutants before the stormwater is discharged. Even more recently, cities have turned to green infrastructure, using existing natural features or creating new features that mimic natural hydrological processes that work to infiltrate or evapo-transpire precipitation, to manage stormwater at its source and keep it out of the conveyance system. These engineered components of stormwater management systems can address both water quantity and quality concerns, as well as provide other benefits to communities. This rule is designed to avoid disincentives to this environmentally beneficial trend in stormwater management practices. This exclusion does not cover transportation ditches; those ditches are addressed under paragraph (b)(3) of the rule. As discussed above, the exclusion in paragraph (b)(6) is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule. However, the agencies do not expect the scope of ditches excluded to be different under paragraphs (b)(3) and (b)(6), so there

should be little practical need to distinguish between the two.

Paragraph (b)(7) of the rule clarifies that wastewater recycling structures constructed in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California and the Southwest where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water, which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, the agencies have consistently regulated aqueducts and canals as "waters of the United States" where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the agencies agree are important and beneficial.

The agencies also received other suggestions for new exclusions that

were not adopted in the final rule. The agencies determined that it was not appropriate or necessary to add certain requested exclusions for one or more reasons, including: (1) The requested exclusion was so broadly characterized as to introduce significant confusion and potentially have the effect of excluding waters that the agencies have consistently determined should be covered as “waters of the U.S.,” (2) the requested exclusion was so site-specific or activity-based as to lack illustrative value, or (3) the requested exclusion was likely covered by another exclusion in the final rule.

It is important to note that while the waters listed in the exclusions are not “waters of the United States,” they can serve as a hydrologic connection that the agencies would consider under a case-specific significant nexus under paragraphs (a)(7) and (a)(8). For example, a wetland may be directly hydrologically connected to a covered tributary via flow through an excluded non-wetland swale. While the swale itself is excluded from jurisdiction, the connection of the wetland to the tributary is relevant for determining whether the wetland has a significant nexus to downstream traditional navigable waters, interstate waters, or the territorial seas. In addition, these geographic features may function as “point sources” under CWA section 502(14), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).

V. Economic Impacts

This rule establishing the definition of “waters of the United States,” by itself, imposes no direct costs. The potential costs and benefits incurred as a result of this rule are considered indirect, because the rule involves a definitional change to a term that is used in the implementation of CWA programs (i.e., sections 303, 305, 311, 401, 402, and 404). Entities currently are, and will continue to be, regulated under these programs that protect “waters of the United States” from pollution and destruction. Each of these programs may subsequently impose direct or indirect costs as a result of implementation of their specific regulations.

While the rule imposes no direct costs, the agencies prepared an economic analysis for informational purposes. In preparing the economic analysis to accompany the final rule, the agencies considered what should be the appropriate baseline for comparison. Existing regulations and historic practice in implementing them represent one appropriate baseline for

comparison, and because the final rule is narrower in jurisdictional scope than the existing regulations, there would be no additional costs in comparison to this baseline. A comparison to recent field practice following the 2008 guidance is also an appropriate baseline, and the agencies prepared illustrative estimates of how the costs and benefits of various CWA programs may change with an increase in positive jurisdictional determinations relative to that baseline.

To estimate changes in potential costs and benefits of different CWA programs, the economic analysis utilizes available program data to estimate the extent to which assertion of jurisdiction might change under the associated final policies. The proposed rule analysis utilized CWA Section 404 jurisdictional determination and permit data from fiscal years 2009–2010 (post SWANCC and *Rapanos*), following issuance of program guidance in 2008 by the EPA and the Corps. The analysis for the final rule has been updated using data from fiscal years 2013–2014, providing a comparison to a more recent year of data, which responds to public comments. An estimate of how assertion of jurisdiction may change compared to the recent practice baseline, developed using updated data from fiscal years 2013–2014 jurisdictional determinations, is then applied to cost and benefit information for affected CWA programs. Additional updates to the economic analysis include a refined approach to calculating benefits from section 404 compensatory mitigation, differentiating between emergent and forested wetlands, as well as presenting results in ranges to reflect uncertainty. The agencies’ economic analysis yielded the following key conclusions:

- Compared to the current regulations and historic practice of making jurisdictional determinations, the scope of jurisdictional waters will decrease, as would the costs and benefits of CWA programs.
- Compared to a baseline of recent practice, the agencies assessed two scenarios. Those scenarios result in an estimated increase of between 2.84 and 4.65 percent in positive jurisdictional determinations annually.
- The agencies’ analysis indicates that for both scenarios, the change in benefits of CWA programs exceed the costs by a ratio of greater than 1:1.
- The economic analysis estimates that incremental annual costs for scenario 1 will range from \$158M–\$307M and incremental annual benefits will range from \$339M–\$350M and, for scenario 2, costs will range from

\$237M–\$465M and benefits will range from \$555M–\$572M.

The agencies conducted this economic analysis to provide the public with information on the potential changes to the costs and benefits of various CWA programs that may result from a change in the number of positive jurisdictional determinations. The economic analysis was done for informational purposes only, and the final decisions on the scope of “waters of the United States” in this rulemaking are not based on consideration of the information in the economic analysis. The economic analysis fulfills the requirements of Executive Orders 13563 and 12866. An explanation of the data, methods, and assumptions used to estimate indirect costs and benefits can be found in the *Economic Analysis for the Clean Water Rule; Definition of “Waters of the United States” Under the Clean Water Act (Final Rule)* in the accompanying docket.

VI. Related Acts of Congress, Executive Orders, and Agency Initiatives

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a “significant regulatory action.” Accordingly, EPA and the Army submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

In addition, EPA and the Army prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in *Economic Analysis of the EPA-Army Clean Water Rule*. A copy of the analysis is available in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the CWA section 402 program may be found at 40 CFR 9.1. (OMB Control No. 2040–0004, EPA ICR No. 0229.19). For the CWA section 404 regulatory

program, the current OMB approval number for information requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final action on small entities, "small entity" is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration's size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, we certify that this final rule will not have a significant economic impact on a substantial number of small entities. See, e.g., *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001); *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); *Am. Trucking Ass'n v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999); *Mid-Tex Elec. Co-op, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

Under the RFA, the impact of concern is any significant adverse economic impact on small entities, because the primary purpose of the initial regulatory flexibility analysis is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. 603. The scope of jurisdiction in this rule is narrower than that under the existing regulations. See 40 CFR 122.2 (defining "waters of the United States"). Because fewer waters will be subject to the CWA under the rule than are subject to regulation under the existing regulations, this action will not affect small entities to a greater degree than the existing regulations. As a consequence, this action will not have

a significant adverse economic impact on a substantial number of small entities, and therefore no regulatory flexibility analysis is required.

This rule is not designed to "subject" any entities of any size to any specific regulatory burden. Rather, it is designed to clarify the statutory scope of "the waters of the United States, including the territorial seas," section 502(7), consistent with Supreme Court precedent. This question of CWA jurisdiction is informed by the tools of statutory construction and the geographical and hydrological factors identified in *Rapanos v. United States*, 547 U.S. 715 (2006), which are not factors readily informed by the RFA.

Nevertheless, the scope of the term "waters of the United States" is a question that has continued to generate substantial interest, particularly within the small business community, because permits must be obtained for many discharges of pollutants into those waters. In light of this interest, the EPA and the Army determined to seek wide input from representatives of small entities while formulating the proposed and final definition of this term that reflects the intent of Congress consistent with the mandate of the Supreme Court's decisions. Such outreach, although voluntary, is also consistent with the President's January 18, 2011 Memorandum on Regulatory Flexibility, Small Business, and Job Creation, which emphasizes the important role small businesses play in the American economy. This process has enabled the agencies to hear directly from these representatives, throughout the rule development, about how they should approach this complex question of statutory interpretation, together with related issues that such representatives of small entities may identify for possible consideration in separate proceedings. The agencies have prepared a report summarizing their small entity outreach, the results of this outreach, and how these results have informed the development of this rule. This report, *Report of the Discretionary Small Entity Outreach for the Revised Definition of Waters of the United States* (Docket Id. No. EPA-HQ-OW-2011-0880-1927), is available in the docket.

D. Unfunded Mandates Reform Act

This action does not contain any unfunded mandate under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531-1538), and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments, or the private sector,

and does not contain regulatory requirements that might significantly or uniquely affect small governments. The definition of "waters of the United States" applies broadly to CWA programs.

E. Executive Order 13132: Federalism

This rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Keeping with the spirit of Executive Order 13132 and consistent with the agencies' policy to promote communications with state and local governments, the agencies consulted with state and local officials throughout the process and solicited their comments on the proposed action and on the development of the rule.

For this rule state and local governments were consulted at the onset of rule development in 2011, and following the publication of the proposed rule in 2014. In addition to engaging key organizations under federalism, the agencies sought feedback on this rule from a broad audience of stakeholders through extensive outreach to numerous state and local government organizations.

Early in the rulemaking process, EPA held two in-person meetings and two phone calls in the fall and winter of 2011. Organizations involved include the National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the County Executives of America, the National Associations of Towns and Townships, the International City/County Management Association, and the Environmental Council of the States. Additionally, the National Association of Clean Water Agencies and the Association of Clean Water Administrators were invited to participate. The agencies held many additional calls and meetings with state and local governments and their associations, in preparation for the development of a proposed rule.

Similarly to the outreach conducted prior to the development of the rule, the agencies committed themselves to providing a transparent, comprehensive, and effective process for taking public comment on the proposed rule. As part of this consultation, EPA held a meeting on May 13, 2014 to seek technical input on the proposed rule from the largest

national representative organizations for State and local governments. During this process the agencies also extended its focused outreach to include a series of meetings with the Local Government Advisory Committee, and the Environmental Council of the States in conjunction with the Association of Clean Water Administrators and the Association of State Wetland Managers. In addition to engaging these key organizations, the agencies sought additional feedback on the proposed rule through broader public outreach to state and local government organizations during the public comment period.

During the consultation process, some participants expressed concern that the proposed changes may impose a resource burden on state and local governments. Some participants urged EPA to ensure that states are not unduly burdened by the regulatory revisions.

The agencies have prepared a report summarizing their voluntary consultation and extensive outreach to State, local, and county governments, the results of this outreach, and how these results have informed the development of today's rule. This report, *Report on the Discretionary Consultation and Outreach to State, Local, and County Governments on the Clean Water Rule: Definition of "Waters of the United States," Final Rule* (Docket Id. No. EPA-HQ-OW-2011-0880) is available in the docket for this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order (E.O.) 13175 (65 FR 67249, November 9, 2000), agencies generally may not issue a regulation that has tribal implications, (1) that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or the agencies consult with tribal officials early in the process of developing the proposed regulation and develop a tribal summary impact statement, or (2) that preempts tribal law unless the agencies consult with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

This action does not have tribal implications as specified in E.O. 13175. In compliance with the EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), the agencies consulted with tribal officials throughout the rulemaking process to

gain an understanding of tribal views and solicited their comments on the proposed action and on the development of this rule. In the course of this consultation, EPA and the Corps jointly participated in aspects of the process.

The agencies began consultation with federally-recognized Indian tribes on the Clean Water Rule defining "waters of the United States" in October 2011. The consultation and coordination process, including providing information on the development of an accompanying science report on the connectivity of streams and wetlands, continued, in stages, over a four year period, until the close of the public comment period on November 14, 2014. EPA invited tribes to provide written input on the rulemaking throughout both the tribal consultation process and public comment period.

EPA specifically consulted with tribal officials to gain an understanding of, and to address, the tribal views on the proposed rule. In 2011, close to 200 tribal representatives and more than 40 tribes participated in the consultation process, which included multiple webinars and national teleconferences and face-to-face meetings. In addition, EPA received written comments from three tribes during the initial consultation period.

EPA continued to provide status updates to the National Tribal Water Council and the National Tribal Caucus during 2012 through 2014. The final consultation event was completed on October 23, 2014 as a national teleconference with the Office of Water's Deputy Assistant Administrator. Ultimately, EPA received an additional 23 letters from tribes/tribal organizations by the completion of the consultation period. The comments indicated that Tribes, overall, support increased clarity of waters protected by the Clean Water Act, but some expressed concern with the consultation process and the burden of any expanded jurisdiction. The agencies considered the feedback received through consultation and written comments in developing today's rule.

The agencies have prepared a report summarizing their consultation with tribal nations, and how these results have informed the development of this rule. This report, *Final Summary of Tribal Consultation for the Clean Water Rule: Definition of "Waters of the United States" Under the Clean Water Act; Final Rule* (Docket Id. No. EPA-HQ-OW-2011-0880), is available in the docket for this rule.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs federal agencies to use voluntary consensus standards in regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs federal agencies to provide Congress, through OMB, explanations when the agency decides not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, the agencies are not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (E.O.) 12898 (59 FR 7629, Feb. 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The agencies have determined that the rule will not have disproportionately high and adverse

human health or environmental effects on minority or low-income populations, because it does not adversely affect the level of protection provided to human health or the environment.

The rule defines the scope of waters protected under the CWA. The increased clarity regarding the definition of “waters of the United States” is intended to benefit all regulators, stakeholders, and interested parties. In addition, this rule is national in scope and, therefore, is not specific to a particular geographic area.

In the spirit of E.O. 12898, input from environmental justice stakeholders was requested during the rule development process, through a series of stakeholder meetings between April and November 2014. On May 12, 2014, EPA held a focused teleconference with non-traditional stakeholders, including environmental justice and faith-based stakeholders, to solicit their individual input on the proposed rule. The agencies have used the feedback from public outreach as the source of early guidance and recommendations for refining the proposed rule. Stakeholder input received during public outreach events in combination with the written comments received during the public comment period have reshaped each of the definitions included in today’s rule, and incorporate increased clarity for regulators, stakeholders, and the regulated public to assist them in identifying waters as “waters of the United States.”

The agencies prepared a report summarizing their outreach to the environmental justice community, analysis of potential impacts, and how these results informed the development of the rule. This report, *Environmental Justice Report for the Clean Water Rule: Definition of “Waters of the United States” Under the Clean Water Act; Final Rule* (Docket Id. No. EPA–HQ–OW–2011–0880), is available in the docket for this rule.

K. Congressional Review Act

This action is subject to the Congressional Review Act (CRA), and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is a “major rule” as defined by 5 U.S.C. 804(2) based on potential indirect costs.

L. Environmental Documentation

In this joint rulemaking, the agencies establish a definitional rule that clarifies the scope of the Clean Water Act. The definition will apply to all provisions of the Act, and this regulation specifically amends EPA regulations implementing

sections 301, 304, 306, 311, 402 and 404, while the Army is making substantively identical revisions to its regulations under section 404 of the CWA. Section 511(c) of the Clean Water Act provides that, except for certain actions not relevant here, no action by EPA constitutes “a major federal action significantly affecting the quality of the human environment within the meaning of [NEPA]”.

The Army has prepared a final environmental assessment and Findings of No Significant Impact consistent with the National Environmental Policy Act (NEPA). The Army has determined that the rule is not a major federal action significantly affecting the quality of the human environment that would require the preparation of an environmental impact statement. The assessment is contained in the record for this rulemaking. Furthermore, appropriate environmental documentation, including an EIS when required, is prepared by the Corps for general permits and specifically for each and every standard individual permit application before making final permit decisions.

M. Judicial Review

Section 509(b)(1) of the CWA provides for judicial review in the courts of appeals of specifically enumerated actions of the Administrator. The Supreme Court and lower courts have reached different conclusions on the types of actions that fall within section 509. *Compare, E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977); *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *National Cotton Council of Amer. v. EPA*, 553 F.3d 927 (6th Cir. 2009) *cert denied* 559 U.S. 936 (2010) *with, Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008); *Friends of the Everglades v. EPA*, 699 F.3d 1280 (11th Cir. 2012) *cert denied* 559 U.S. 936 (2010).

See DATES section for information regarding the timing for seeking judicial review of this rule.

List of Subjects

33 CFR Part 328

Environmental protection, Administrative practice and procedure, Intergovernmental relations, Navigation, Water pollution control, Waterways.

40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 301, and 401

Environmental protection, Water pollution control.

Dated: May 27, 2015.

Gina McCarthy,

Administrator, Environmental Protection Agency.

Dated: May 27, 2015.

Jo-Ellen Darcy,

Assistant Secretary of the Army, (Civil Works), Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter II of the Code of Federal Regulations is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

* 1. The authority citation for part 328 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

* 2. Section 328.3 is amended by revising paragraphs (a) through (c), removing paragraphs (d) and (e), and redesignating paragraph (f) as paragraph (d) to read as follows:

§328.3 Definitions.

* * * * *

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term “waters of the United States” means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (a)(7)(i) through (v) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (a)(7)(i) through (v) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1)

through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

(6) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(7) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(c) *Definitions*. In this section, the following definitions apply:

(1) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this

section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring*. The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this

section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream paragraph (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (c)(5)(i) through (ix) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

- (i) Sediment trapping,
- (ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 110—DISCHARGE OF OIL

* 3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*, 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971–1975 Comp., p. 793.

* 4. Section 110.1 is amended by removing the definition of “wetlands” and revising the definition of “navigable waters” to read as follows:

§110.1 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(1) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this section), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank,

shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 112—OIL POLLUTION PREVENTION

* 5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

* 6. Section 112.2 is amended by removing the definition of “wetlands” and revising the definition of “Navigable waters” to read as follows:

§112.2 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the

100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow

sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the

chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent

aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCE

* 7. The authority citation for part 116 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

* 8. Section 116.3 is amended by revising the definition of “Navigable waters” to read as follows:

§116.3 Definitions.

* * * * *

Navigable waters is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire

water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal

circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider

the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

* 9. The authority citation for part 117 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.* and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

* 10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§117.1 Definitions.

* * * * *

(i) *Navigable waters* is defined in section 502(7) of the Act to mean “waters of the United States, including the territorial seas.”

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (i)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (i)(3)(iii) of this section, of waters identified in paragraphs (i)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (i)(1)(i) through

(v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (i)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (i)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (i)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (i)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (iii) of this

section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (i)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (i)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (i)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; ground water recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (i)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (i)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (i)(1)(i) through (v) or are located at the head of a water identified in paragraphs (i)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (i)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (i)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (i)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (i)(1)(iv) of this section), to

a water identified in paragraphs (i)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (i)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (i)(1)(i) through (iii) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (i)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in

paragraphs (i)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (i)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (i)(1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

**PART 122—EPA ADMINISTERED
PERMIT PROGRAMS: THE NATIONAL
POLLUTANT DISCHARGE
ELIMINATION SYSTEM**

* 11. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

* 12. Section 122.2 is amended by:

* a. Lifting the suspension of the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620);

* b. Removing the definition of “wetlands” and revising the definition of “Waters of the United States” and

* c. Suspending the last sentence of the definition of “Waters of the United States” published July 21, 1980 (45 FR 48620).

The revision reads as follows:

§122.2 Definitions.

* * * * *

Waters of the United States or waters of the U.S. means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this section, of waters identified in paragraphs (1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters

identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (v) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to

meet the requirements of the Clean Water Act. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]

(ii) Prior converted cropland.

Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water tributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus

to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified

in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,
(D) Retention and attenuation of flood waters,
(E) Runoff storage,
(F) Contribution of flow,
(G) Export of organic matter,
(H) Export of food resources, and
(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

* 13. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

* 14. Section 230.3 is amended by:
* a. Removing paragraph (b) and reserved paragraphs (f), (g), (j) and (l).

- * b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d).
- * c. Redesignating paragraphs (h) and (i) as paragraphs (e) and (f).
- * d. Redesignating paragraph (k) as paragraph (g).
- * e. Redesignating paragraphs (m) through (q) as paragraphs (h) through (l).
- * f. Redesignating paragraph (q-1) as paragraph (m).
- * g. Redesignating paragraph (r) as paragraph (n).
- * h. Redesignating paragraph (s) as paragraph (o).
- * i. Revising newly redesignated paragraph (o).
- * j. Removing paragraph (t).

The revision reads as follows:

§230.3 Definitions.

* * * * *

(o) The term *waters of the United States* means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (o)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (o)(3)(iii) of this section, of waters identified in paragraphs (o)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (o)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (o)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. The waters identified in each of paragraphs (o)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis.

If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (o)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (o)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (o)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (o)(1)(iv) through (viii) of this section.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland.

Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (o), the following definitions apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (o)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of

adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (o)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (o)(1)(i) through (v) or are located at the head of a water identified in paragraphs (o)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (o)(1)(i) through (v) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (o)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (o)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (o)(1)(iv) of this section), to a water identified in paragraphs (o)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (o)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for

any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (o)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (o)(1)(i) through (iii) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (o)(1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (o)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (o)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

(A) Sediment trapping,
(B) Nutrient recycling,
(C) Pollutant trapping, transformation, filtering, and transport,

(D) Retention and attenuation of flood waters,

(E) Runoff storage,

(F) Contribution of flow,

(G) Export of organic matter,

(H) Export of food resources, and

(I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (o)(1) through (3) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

* 15. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

* 16. Section 232.2 is amended by removing the definition of "wetlands" and revising the definition of "Waters of the United States" to read as follows:

§232.2 Definitions.

* * * * *

Waters of the United States means:

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this

definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges,

intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi) of this definition, they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for

rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands

generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the

land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

* 17. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

* 18. Section 300.5 is amended by revising the definition of “navigable waters” to read as follows:

§300.5 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition

where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(vii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of

this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater

recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is

characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant

nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this definition.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

* 19. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of “navigable waters” to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (3)(iii) of this definition, of waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands

found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) Waste treatment systems (other than cooling ponds meeting the criteria of this paragraph) are not waters of the United States.

(ii) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(iii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into

a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(v) Groundwater, including groundwater drained through subsurface drainage systems.

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vii) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring.* The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (1)(iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified

in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by

physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 302—DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

* 20. The authority citation for part 302 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

* 21. Section 302.3 is amended by revising the definition of “Navigable waters” to read as follows:

§302.3 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this definition, the term “waters of the United States” means:

- (i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (ii) All interstate waters, including interstate wetlands;
- (iii) The territorial seas;
- (iv) All impoundments of waters otherwise identified as waters of the United States under this section;
- (v) All tributaries, as defined in paragraph (3)(iii) of this definition, of

waters identified in paragraphs (1)(i) through (iii) of this definition;

(vi) All waters adjacent to a water identified in paragraphs (1)(i) through (v) of this definition, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (1)(vii)(A) through (E) of this definition where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. The waters identified in each of paragraphs (1)(vii)(A) through (E) of this definition are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes*. Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays*. Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins*. Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools*. Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands*. Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermount flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this definition. For waters determined to have a significant nexus,

the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (iii) of this definition or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (1)(vi) of this definition when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this definition.

(i) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of this definition.

(ii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iii) Groundwater, including groundwater drained through subsurface drainage systems.

(iv) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(v) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary

structures built for wastewater recycling.

(3) In this definition, the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (1)(i) through (v) of this definition, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (1)(i) through (v) of this definition. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (1)(i) through (v) or are located at the head of a water identified in paragraphs (1)(i) through (v) of this definition and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary and tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (1)(iv) of this definition), to a water identified in paragraphs (1)(i) through (iii) of this definition that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These

physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (2) of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (1)(i) through (iii) of this definition.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition. The term “in the region” means the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (3)(v)(A) through (I) of this definition. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with

similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (1)(i) through (iii) of this definition. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (1)(i) through (iii) of this section.

(vi) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

PART 401—GENERAL PROVISIONS

* 22. The authority citation for part 401 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

* 23. Section 401.11 is amended by revising paragraph (I) to read as follows:

§401.11 General definitions.

* * * * *

(I) The term *navigable waters* means the waters of the United States, including the territorial seas.

(1) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (I)(2) of this section, the term “waters of the United States” means:

(i) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) All interstate waters, including interstate wetlands;

(iii) The territorial seas;

(iv) All impoundments of waters otherwise identified as waters of the United States under this section;

(v) All tributaries, as defined in paragraph (I)(3)(iii) of this section, of waters identified in paragraphs (I)(1)(i) through (iii) of this section;

(vi) All waters adjacent to a water identified in paragraphs (I)(1)(i) through (v) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(vii) All waters in paragraphs (I)(1)(vii)(A) through (E) of this section where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (1)(i) through (iii) of this section. The waters identified in each of paragraphs (I)(1)(vii)(A) through (E) of this section are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (I)(1)(i) through (iii) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (I)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (I)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(A) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(B) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(C) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(D) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(E) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermountain flats, and mima mound wetlands located along the Texas Gulf Coast.

(viii) All waters located within the 100-year floodplain of a water identified in (I)(1)(i) through (iii) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (I)(1)(i) through (v) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (I)(1)(i) through (iii) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in paragraphs (I)(1)(i) through (iii) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph (I)(1)(vi) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (I)(1)(vi), they are an adjacent water and no case-specific significant nexus analysis is required.

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (I)(1)(iv) through (viii) of this section.

(i) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(ii) The following ditches:

(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (I)(1)(i) through (iii) of this section.

(iii) The following features:

(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(C) Artificial reflecting pools or swimming pools created in dry land;

(D) Small ornamental waters created in dry land;

(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(G) Puddles.

(iv) Groundwater, including groundwater drained through subsurface drainage systems.

(v) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.

(vi) Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.

(3) In this paragraph (I), the following terms apply:

(i) *Adjacent*. The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (I)(1)(i) through (v) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (I)(1)(i) through (v) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (I)(1)(i) through (v) or are located at the head of a water identified in paragraphs (I)(1)(i) through (v) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(ii) *Neighboring*. The term *neighboring* means:

(A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (I)(1)(i) through (v) of this section. The entire water is neighboring if a portion is

located within 100 feet of the ordinary high water mark;

(B) All waters located within the 100-year floodplain of a water identified in paragraphs (I)(1)(i) through (v) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(C) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (I)(1)(i) or (iii) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(iii) *Tributary* and *tributaries*. The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (I)(1)(iv) of this section), to a water identified in paragraphs (I)(1)(i) through (iii) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (I)(2) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (I)(1)(i) through (iii) of this section.

(iv) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence

of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(v) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (I)(1)(i) through (iii) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (I)(1)(i) through (iii) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (1)(i) through (iii) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (I)(3)(v)(A) through (I) of this section. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (I)(1)(i) through (iii) of this section. Functions relevant to the significant nexus evaluation are the following:

- (A) Sediment trapping,
- (B) Nutrient recycling,
- (C) Pollutant trapping, transformation, filtering, and transport,
- (D) Retention and attenuation of flood waters,
- (E) Runoff storage,
- (F) Contribution of flow,
- (G) Export of organic matter,
- (H) Export of food resources, and
- (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (I)(1)(i) through (iii) of this section.

(vi) *Ordinary high water mark*. The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(vii) *High tide line*. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the

foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure

from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

* * * * *

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BILLING CODE 6560-50-P

To: Johnson, CynthiaN[Johnson.CynthiaN@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Mon 4/17/2017 4:43:46 PM
Subject: Please make a 1-time change to Donna's CD

Hi Cynthia --

Personal Matters / Ex. 6

Thanks!

Donna

-----Original Message-----

From: Eisenberg, Mindy
Sent: Monday, April 17, 2017 12:36 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: A couple of questions and an FYI

Hi Donna

Personal Matters / Ex. 6

For Corps meeting today - I have a couple of quick things. Is there anything rule-related to touch on? I haven't seen the options paper for the **Deliberative Process / Ex. 5** have you? Also, can you remember when they thought they would hear back from **Deliberative Process / Ex. 5**

thanks

Mindy Eisenberg
Acting Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

-----Original Message-----

From: Downing, Donna
Sent: Monday, April 17, 2017 12:12 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Subject: A couple of questions and an FYI

Hiya Mindy --

Since you were on the phone when I stuck my head in (twice), I decided it would be less disruptive and more helpful to send you an email with my couple of questions --

-- when is the meeting with Mike this afternoon for the draft run-through Federalism powerpoint? If possible, I'd be very interesting in attending.

-- Are we on with the Corps this afternoon at 2pm?? I don't know of non-WOTUS agenda items, but know you might have some.

Personal Matters / Ex. 6

Personal Matters / Ex. 6

FYI, I'll be sending an agenda for the Wednesday 10am meeting for your consideration shortly. (First am

coordinating with Simma on the preamble).

Thanks for any thoughts you might have!

Donna

-----Original Message-----

From: Eisenberg, Mindy

Sent: Monday, April 17, 2017 11:29 AM

To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Stacey.M.Jensen@usace.army.mil; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: Federalism powerpoint

Hi Simma,

We're going to be meeting with Mike Shapiro this afternoon to run the presentation past him to get feedback and then plan to share with Sarah and others to see what their comfort level is. They seemed to open the door a little on Wednesday evening, so we'll see.

Mindy

Mindy Eisenberg

Acting Director, Wetlands Division

Office of Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency

1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460

(202) 566-1290

eisenberg.mindy@epa.gov

-----Original Message-----

From: Kupchan, Simma

Sent: Monday, April 17, 2017 10:49 AM

To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Stacey.M.Jensen@usace.army.mil; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: RE: Federalism powerpoint

I think the revised version looks good. Thanks for all of your work on this, Damaris and everyone else.

My only question is about the content of slides

Deliberative Process / attorney client Ex. 5

Deliberative Process / attorney client Ex. 5

Deliberative Process / attorney client Ex. 5

Thanks,

Simma Kupchan

Water Law Office

US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q

(p) 202-564-3105

-----Original Message-----

From: Christensen, Damaris

Sent: Friday, April 14, 2017 10:09 PM

To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Stacey.M.Jensen@usace.army.mil; Cindy Barger <cindy.s.barger.civ@mail.mil>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Hewitt, Julie <Hewitt.Julie@epa.gov>
Subject: Federalism powerpoint

Several sharepoint glitches later, the federalism ppt is up to date. I suggest that this group identify any additional edits by early afternoon Monday, especially focusing on the later (new) slides where I lay

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

By Monday COB we should be ready to forward up, with the understanding that politicals will want to review the slides before the meeting and the earlier they see them the better.

Here's the link.

Nonresponsive Internal URL/ Ex. 6

Also in the federalism folder shortly will be a draft agenda and a draft run of show. You are welcome to peek at early drafts but I'll send a link around after I've had a chance to touch base with Jake Strickler, who is facilitating, on Monday.

Damaris

-----Original Message-----

From: Christensen, Damaris [mailto:Christensen.Damaris@epa.gov]

Sent: Friday, April 14, 2017 5:05 PM

To: Wehling, Carrie <Wehling.Carrie@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>; Kwok, Rose <Kwok.Rose@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Stacey.M.Jensen@usace.army.mil; Cindy Barger <cindy.s.barger.civ@mail.mil>
Subject: Heads up

I'll be sending around a link to review the new content-added federalism PowerPoint in a couple hours.

Personal Matters / Ex. 6

Damaris

Sent from my iPhone

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Mon 4/17/2017 4:33:37 PM
Subject: RE: Emailing: draft Agenda -- WOTUS 19 April 2017 v1.docx

HA! You're fast.

Donna

-----Original Message-----

From: Eisenberg, Mindy
Sent: Monday, April 17, 2017 12:30 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; McDavid, Michael W. <Mcdavit.Michael@epa.gov>
Subject: RE: Emailing: draft Agenda -- WOTUS 19 April 2017 v1.docx

With attachment

Mindy Eisenberg
Acting Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

-----Original Message-----

From: Downing, Donna
Sent: Monday, April 17, 2017 12:21 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; McDavid, Michael W. <Mcdavit.Michael@epa.gov>
Subject: Emailing: draft Agenda -- WOTUS 19 April 2017 v1.docx

Hi Mindy --

Attached is a draft agenda for Wednesday's 10am leadership meeting. Essentially, the agenda provides for **Deliberative Process / Ex. 5** The goal would be **Deliberative Process / Ex. 5**

Next week an important focus should be **Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

Please let me know if you have suggested edits or redirections. Thanks!

Donna

Your message is ready to be sent with the following file or link attachments:

Agenda -- WOTUS 19 April 2017 v1.docx

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Mon 4/17/2017 4:33:23 PM
Subject: RE: Emailing: draft Agenda -- WOTUS 19 April 2017 v1.docx

Was there an attachment with edits to the agenda?

Sounds fine re: next week's meeting -- **Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

Also, just got an invitation to today's Federalism run-through from Mike.

Donna

-----Original Message-----

From: Eisenberg, Mindy
Sent: Monday, April 17, 2017 12:29 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>
Subject: RE: Emailing: draft Agenda -- WOTUS 19 April 2017 v1.docx

Hi Donna,
Here are a few edits to the draft agenda. Thanks!

For next week's meeting, let's **Deliberative Process / Ex. 5** I'm hoping that they
may want us to focus on **Deliberative Process / Ex. 5**

Thanks

Mindy Eisenberg
Acting Director, Wetlands Division
Office of Wetlands, Oceans and Watersheds U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW, mailcode 4502T Washington, DC 20460
(202) 566-1290
eisenberg.mindy@epa.gov

-----Original Message-----

From: Downing, Donna
Sent: Monday, April 17, 2017 12:21 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Kwok, Rose <Kwok.Rose@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; McDavit, Michael W. <Mcdavit.Michael@epa.gov>
Subject: Emailing: draft Agenda -- WOTUS 19 April 2017 v1.docx

Hi Mindy --

Attached is a draft agenda for Wednesday's 10am leadership meeting. Essentially, the agenda provides
for **Deliberative Process / Ex. 5** The
goal would be **Deliberative Process / Ex. 5**

Next week an important focus should be **Deliberative Process / Ex. 5**

Deliberative Process / Ex. 5

Please let me know if you have suggested edits or redirections. Thanks!

Donna

Your message is ready to be sent with the following file or link attachments:

Agenda -- WOTUS 19 April 2017 v1.docx

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
Cc: Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov];
McDavit, Michael W.[Mcdavit.Michael@epa.gov]
From: Downing, Donna
Sent: Mon 4/17/2017 4:21:27 PM
Subject: Emailing: draft Agenda -- WOTUS 19 April 2017 v1.docx
Agenda -- WOTUS 19 April 2017 v1.docx

Hi Mindy --

Attached is a draft agenda for Wednesday's 10am leadership meeting. Essentially, the agenda provides for **Deliberative Process / Ex. 5**. The goal would be **Deliberative Process / Ex. 5**.

Next week an important focus should be **Deliberative Process / Ex. 5**.

Deliberative Process / Ex. 5

Please let me know if you have suggested edits or redirections. Thanks!

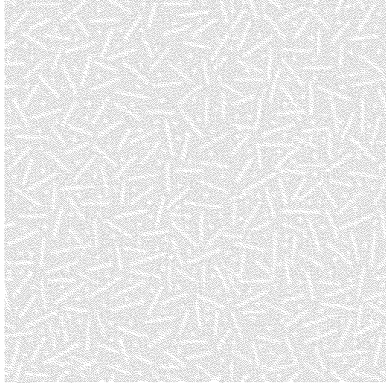
Donna

Your message is ready to be sent with the following file or link attachments:

Agenda -- WOTUS 19 April 2017 v1.docx

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

To: Johnson, Terri[Johnson.Terri@epa.gov]
From: Downing, Donna
Sent: Thur 4/13/2017 9:53:11 PM
Subject: RE: talking points for Benita
[draft Basic Talking Points.docx](#)



Hi Terri:

Yeah, we're pretty busy but I did remember your request. I hadn't sent any TPs because the WOTUS rule situation is

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

With that warning, attached please find the current set of talking points. Let's touch base closer to Rally time to make sure the TPs reflect the then-latest public position.

Thanks!

Donna

From: Johnson, Terri
Sent: Thursday, April 13, 2017 4:23 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: FW: talking points for Benita

I know you must be crazy busy but if you have a chance to forward the talking points

you mentioned for the CWA rule it would help me as I develop talking points for Benita and John

I need to get the first draft off to Surabhi Shah for review then they go to Benita for the briefing.

From: Johnson, Terri
Sent: Wednesday, April 05, 2017 12:55 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: talking points for Benita

Rally is May 8th – 11th and she will be talking to NGOs, our regions and other Feds.

Thanks Donna

Terri Johnson

EPA- Office of Water

Urban Waters Program

202-564-8296

To: Rose Kwok[Kwok.Rose@epa.gov]
From: Downing, Donna
Sent: Mon 4/10/2017 5:56:33 PM
Subject: FW: Format of proposed rule text?
Jensen Step 1 Rule Drafts.docx

Think this is the latest...

DMD

-----Original Message-----

From: Jensen, Stacey M CIV USARMY HQDA (US) [mailto:Stacey.M.Jensen@usace.army.mil]
Sent: Thursday, April 06, 2017 8:29 AM
To: Kupchan, Simma <Kupchan.Simma@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>
Subject: RE: Format of proposed rule text?

A few minor edits. Thank you, Simma!

-----Original Message-----

From: Kupchan, Simma [mailto:Kupchan.Simma@epa.gov]
Sent: Wednesday, April 05, 2017 5:23 PM
To: Downing, Donna <Downing.Donna@epa.gov>; Christensen, Damaris <Christensen.Damaris@epa.gov>; Jensen, Stacey M CIV USARMY HQDA (US) <Stacey.M.Jensen@usace.army.mil>
Cc: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>
Subject: [Non-DoD Source] RE: Format of proposed rule text?

Thanks to all for your input. Attached is a draft strikethrough rule text. I welcome your review.

Simma Kupchan

Water Law Office

US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q

(p) 202-564-3105

From: Downing, Donna
Sent: Wednesday, April 05, 2017 3:15 PM
To: Christensen, Damaris <Christensen.Damaris@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Stacey Jensen <Stacey.M.Jensen@usace.army.mil>
Subject: RE: Format of proposed rule text?

I concur with

Deliberative Process / attorney client Ex. 5

Deliberative Process / attorney client Ex. 5

Deliberative Process / attorney client Ex. 5

From: Christensen, Damaris
Sent: Wednesday, April 05, 2017 2:40 PM
To: Kupchan, Simma <Kupchan.Simma@epa.gov <mailto:Kupchan.Simma@epa.gov> >; Wehling, Carrie <Wehling.Carrie@epa.gov <mailto:Wehling.Carrie@epa.gov> >; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov <mailto:Eisenberg.Mindy@epa.gov> >; Downing, Donna <Downing.Donna@epa.gov <mailto:Downing.Donna@epa.gov> >; Stacey Jensen <Stacey.M.Jensen@usace.army.mil <mailto:Stacey.M.Jensen@usace.army.mil> >
Subject: RE: Format of proposed rule text?

I think **Deliberative Process / attorney client Ex. 5**

Deliberative Process / attorney client Ex. 5

Might be useful to take, say, **Deliberative Process / attorney client Ex. 5**

From: Kupchan, Simma
Sent: Wednesday, April 05, 2017 2:36 PM
To: Wehling, Carrie <Wehling.Carrie@epa.gov <mailto:Wehling.Carrie@epa.gov> >; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov <mailto:Eisenberg.Mindy@epa.gov> >; Downing, Donna <Downing.Donna@epa.gov <mailto:Downing.Donna@epa.gov> >; Christensen, Damaris <Christensen.Damaris@epa.gov <mailto:Christensen.Damaris@epa.gov> >; Stacey Jensen <Stacey.M.Jensen@usace.army.mil <mailto:Stacey.M.Jensen@usace.army.mil> >
Subject: Format of proposed rule text?

All,

In "drafting" the proposed rule text for next week's meeting, do we just want **Deliberative Process / attorney client Ex. 5**
Deliberative Process / attorney client Ex. 5?

Or do we want **Deliberative Process / attorney client Ex. 5**
Deliberative Process / attorney client Ex. 5? I assume we **Deliberative Process / attorney client Ex. 5**
Deliberative Process / attorney client Ex. 5

I wanted to nail down today as I will be out of the office Friday - Wednesday.

Thanks,

Simma Kupchan

Water Law Office

US EPA Office of General Counsel

William Jefferson Clinton Building North Room 7426Q

(p) 202-564-3105

To: Christensen, Damaris[Christensen.Damaris@epa.gov]; Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Wed 4/5/2017 7:32:18 PM
Subject: RE: federalism letter

Deliberative Process / Ex. 5

Donna

From: Christensen, Damaris
Sent: Wednesday, April 05, 2017 3:28 PM
To: Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>
Subject: federalism letter

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Thoughts?

To: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Wed 4/5/2017 5:07:05 PM
Subject: RE: Corps_FedConInviteWOTUS2.docx
DD comments-Corps_FedConInviteWOTUS2.docx

Deliberative Process / Ex. 5

Donna

From: Christensen, Damaris
Sent: Wednesday, April 05, 2017 12:46 PM
To: Hanson, Andrew <Hanson.Andrew@epa.gov>; Downing, Donna
<Downing.Donna@epa.gov>
Subject: Corps_FedConInviteWOTUS2.docx

Deliberative Process / Ex. 5

To: Kwok, Rose[Kwok.Rose@epa.gov]
Cc: Christensen, Damaris[Christensen.Damaris@epa.gov]
From: Downing, Donna
Sent: Tue 4/4/2017 3:20:04 PM
Subject: RE: Sharepoint new sub directory
[CWR Schedule 3Apr2017 Expanded.pdf](#)
[CWR Schedule 3Apr17 OnePage.pdf](#)
[2017 WOTUS 2 Draft Proposed Rule Text 4.3.17.docx](#)
[Agenda -- WOTUS2 staff mtg 4 April 2017 v1.docx](#)

Deliberative Process / Ex. 5

Thanks!

Donna

-----Original Message-----

From: Kwok, Rose
Sent: Tuesday, April 04, 2017 11:09 AM
To: Downing, Donna <Downing.Donna@epa.gov>
Subject: RE: Sharepoint new sub directory

Deliberative Process / Ex. 5

-----Original Message-----

From: Downing, Donna
Sent: Tuesday, April 04, 2017 10:57 AM
To: Kwok, Rose <Kwok.Rose@epa.gov>
Subject: Sharepoint new sub directory

Hi Rose--

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Sent from my iPhone

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]
From: Downing, Donna
Sent: Tue 3/28/2017 9:28:30 PM
Subject: FW: URGENT! Industry Coffee tomorrow morning

Good call, Mindy!

Donna

From: Campbell, Ann
Sent: Tuesday, March 28, 2017 5:18 PM
To: Downing, Donna <Downing.Donna@epa.gov>
Cc: Peck, Gregory <Peck.Gregory@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Nandi, Romell <Nandi.Romell@epa.gov>; Thomas, Latosha <Thomas.Latosha@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Subject: Re: URGENT! Industry Coffee tomorrow morning

Thanks everyone for the quick thinking. Will run this by Mike. -Ann
On Mar 28, 2017, at 5:06 PM, Downing, Donna <Downing.Donna@epa.gov> wrote:

Looks good to me, particularly with Greg’s edits -- an appropriate level of detail for this stage of the rulemaking, yet enough to spur potentially helpful discussion.

Donna

From: Peck, Gregory
Sent: Tuesday, March 28, 2017 5:05 PM
To: Goodin, John <Goodin.John@epa.gov>; Campbell, Ann <Campbell.Ann@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
Cc: Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Nandi, Romell <Nandi.Romell@epa.gov>; Thomas, Latosha <Thomas.Latosha@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Downing, Donna <Downing.Donna@epa.gov>
Subject: Re: URGENT! Industry Coffee tomorrow morning

Given the posture of the rule as we now understand it, I would Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

From: Goodin, John
Sent: Tuesday, March 28, 2017 4:26:04 PM
To: Campbell, Ann; Eisenberg, Mindy
Cc: Best-Wong, Benita; Nandi, Romell; Thomas, Latosha; Neugeboren, Steven; Peck, Gregory; Downing, Donna
Subject: RE: URGENT! Industry Coffee tomorrow morning

Would this work for Mike?

Given the posture of the rule as we now understand it, I would Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Deliberative Process / Ex. 5

Adding Steve and Greg so that they are aware and can weigh in.

Thanks

John

From: Campbell, Ann

Sent: Tuesday, March 28, 2017 4:07 PM

To: Goodin, John <Goodin.John@epa.gov>; Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>

Cc: Best-Wong, Benita <Best-Wong.Benita@epa.gov>; Nandi, Romell <Nandi.Romell@epa.gov>; Thomas, Latosha <Thomas.Latosha@epa.gov>

Subject: URGENT! Industry Coffee tomorrow morning

Folks, apologize for what might seem like a late hit, I think something may have gotten lost in translation. Mike was hoping to use a portion of tomorrow's time with the industry group to engage in a discussion around the direction of the WOTUS 2.0 efforts. He was hoping we'd have a few discussion questions to use for this meeting (and in future engagements with other groups) to conduct some early outreach and obtain initial reactions. The TPs I just saw are standard, which is good, but, Mike was hoping to use this meeting for some engagement. Can discussion questions be drafted quickly enough for use tomorrow? I think he'd be disappointed to lose this opportunity but I'll let him know if it can't be done.

To: Ann Campbell[Campbell.Ann@epa.gov]
Cc: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Goodin, John[Goodin.John@epa.gov]; Rose Kwok[Kwok.Rose@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]; Best-Wong, Benita[Best-Wong.Benita@epa.gov]; Peck, Gregory[Peck.Gregory@epa.gov]; Shapiro, Mike[Shapiro.Mike@epa.gov]; Neugeboren, Steven[Neugeboren.Steven@epa.gov]; Wehling, Carrie[Wehling.Carrie@epa.gov]; Kupchan, Simma[Kupchan.Simma@epa.gov]; Karyn Wendelowski[wendelowski.karyn@epa.gov]; Nandi, Romell[Nandi.Romell@epa.gov]
From: Downing, Donna
Sent: Tue 3/28/2017 8:31:14 PM
Subject: For review & forwarding: draft agenda and latest draft WOTUS rule text
[2017 WOTUS 2 Draft Proposed Rule Text for 3.29.17 meeting.docx](#)
[Agenda -- Wetlands General 29 Mar 2017 v1.docx](#)

Hi Ann (with a cc to the Usuals) –

Attached please find a draft agenda for tomorrow morning's interagency Wetlands General meeting. Also attached is the latest draft rule, reflecting this morning's discussions with interagency staff. Could you review and see if the agenda and/or rule text need any tweaks before distributing to meeting attendees, and if not, pass onto Crystal?

Thanks! Please let me know if you have any questions or suggestions.

Donna

Donna Downing
Acting Chief, Wetlands and Aquatic Resources Regulatory Branch
Office of Wetlands, Oceans & Watersheds
U.S. Environmental Protection Agency
ph: (202) 566-1367
downing.donna@epa.gov

USPS Address:
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Delivery Address:
1301 Constitution Avenue, NW, room 7214-D
Washington, DC 20004

To: Eisenberg, Mindy[Eisenberg.Mindy@epa.gov]; Christensen, Damaris[Christensen.Damaris@epa.gov]
Cc: Rose, Kwok[Kwok.Rose@epa.gov]; Goodin, John[Goodin.John@epa.gov];

Personal Email / Ex. 6

From: Downing, Donna
Sent: Fri 3/17/2017 7:32:00 PM
Subject: Planning for next week's WOTUS-2 activities
Planning for the week of 20 March.docx

Hi Mindy and Damaris –

Attached is a summary of what's underway regarding WOTUS-2 relevant for next week's activities, when Rose and I are out for much/all of the week. As the summary indicates, Damaris is the JD Team lead next week.

Donna

Donna Downing
Jurisdiction Team Leader
Office of Wetlands, Oceans & Watersheds
U.S. Environmental Protection Agency
ph: (202) 566-1367
downing.donna@epa.gov

USPS Address:
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Delivery Address:
1301 Constitution Avenue, NW, room 7214-D
Washington, DC 20004